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TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1912.

NO. 858

Florida East Coast Railway Co.
vs. Appellant.
The United States,
Respondent
Interstate Commerce Commission, et al.
Appellees.

On Appeal from the Commerce Court.

BRIEF OF APPELLANT.

This is an appeal from the judgment and decree of the United States Commerce Court entered November 14, 1912, dissolving a temporary injunction and dismissing a bill filed by the Appellant for injunction and relief.

STATEMENT OF THE CASE.

The Florida East Coast Railway Company is a corporation under the laws of the State of Florida, and its lines of railroad lie wholly within that State, extending from Jacksonville on the north to Key West on the south, a distance of 523 miles, that the distance from Jacksonville to Miami is 366 miles, from Miami to Homestead 28 miles, and from Homestead to Key West 128 miles.

The record shows that the Florida East Coast Railway originated in uniting three short lines; one from Jacksonville to St. Augustine; the second from St. Augustine to Palatka; and the third from Palatka to Daytona. Each of these short lines was a separate and independent corporation with separate and independent officers, and they do not appear to have been very profitable while thus separately managed and operated. Mr. H. M. Flagler purchased some of the stock of the road from Jacksonville to St. Augustine and also a considerable amount of the bonds on each of the three roads. In this way he acquired the three roads and charged on his books not what the roads themselves cost but what he paid for the stock and bonds. Subsequently he purchased the line from New Smyrna to Orange City Junction; also the line from Titusville to Enterprise; and the line from Jacksonville to Mayport, these three latter being branch lines to the main line.

The three short lines from Jacksonville to Daytona after they had been united and placed under one management and operation appear to have been very profitable. At that time the passenger rates were 5 cents per mile, and so high were the freight rates that the rate on a ton of fertilizer from Jacksonville to Daytona, a distance of 110 miles, was greater than the present rate on a ton of fertilizer from Jacksonville to Miami, a distance of 366 miles, or more than three times the distance.

No interest appears to have been paid on the bonds nor dividends on the stock, but the entire profits were expended in the betterment and improvement of the

line, as shown by the Plant Account. Subsequently against these profits thus used were charged five years' dividends on one million dollars of stock owned by Mr. Flagler and in bonds paid to Mr. Flagler. (See Plant Account, page 878 of record.)

After remaining some time operating with the terminus at Rockledge and developing the business the road was extended from Daytona to Titusville, where the terminus remained for some time so as to develop the business when it was extended still further South to Rockledge. Here it remained also for some time when it was extended to West Palm Beach. The business having developed sufficienty to warrant further extension, the work of extension was resumed to Miami, which place was then practically only a name.

Before reaching Miami, in compliance with the law of the State (Section 21 of the Act of 1887, afterwards Sec. 2246 of the Revised Statutes, and now Sec. 2810 of the General Statutes of Florida), the Board of Directors of the Company held a meeting and resolved to extend the road to the island of Key West. Under the Statute, a certificate of the proposed change in route was filed with the Secretary of State and entered of record and from that time the Company became vested with a charter to Key West. It is submitted, therefore, that it is perfectly clear and indisputable that in 1893 the Company contemplated and determined to build to the island of Key West, as the Record shows. The line of road from Rockledge to West Palm Beach being very sparsely populated and the line from West Palm Beach to Mi-

ami being almost uninhabited, the road remained at Miami for several years until there had been sufficient development to warrant further extension. Mr. Flagler constructed magnificent hotels at Palm Beach, thereby attracting thousands of tourists annually who would otherwise have never gone there.

The pineapple industry was started and developed until it assumed large proportions. Between West Palm Beach and Miami the vegetable industry was also enormously developed.

NO INCREASE OF RATES.

From the very start not a single increase of rates, either of freight or passengers, has ever been made on the Florida East Coast Railway. Beginning at a flat rate of 5 cents per mile for passengers it was reduced first to 4 cents, then to 3 cents per mile, with thousand mile tickets at 2½ cents per mile. As the business developed there was a reduction on the rates on freight so that every extension, instead of constituting a burden on so much of the road as had been previously built up, became the primary cause of a reduction of rates, both on passengers and freight. This appears conclusively from the record in this cause. There is not a single word in it which shows that the Florida East Coast Railway Company has ever added to freight or passenger rates as a result of any extension made on its line.

EXTENSION TO KEY WEST.

When the development at Miami warranted it, the work of construction to Key West begun. As the

record shows, necessarily, as each extension was put under construction, accounts were kept separately from the operating expenses of the balance of the line, which had been previously formally put in operation. Thus, when it extended from Daytona to Titusville the accounts of that construction were necessarily kept separately, and so on all the way to Miami. When the work of extension to Key West begun the extension was known as the Cutler extension and afterwards as the Homestead extension, and the accounts were kept separately. On arriving at Homestead the work was temporarily suspended for the purpose of definitely determining whether the line into Key West should be along the Keys or continue on the mainland to Cape Sable and then across over the narrow waters to Key West. This, of course, required months. In the latter part of 1904 the line to Homestead had been completed and put in regular operation. In 1905 so anxious were the people of Florida to have the road constructed to Key West that in that year the Legislature enacted a law declaring such desire and offering such inducements as the Constitution of the State would permit for the construction of this line. The only benefit that this Act conferred upon the Florida East Coast Railway Company was to settle all questions as to the right of purpresture over the waters between the Keys and also to settle the question of taxation. The law did not confer upon the Florida East Coast Railway Company a single chartered right which it did not previously possess, as it was exceedingly doubtful whether or not the State of Florida had any interest

over the submerged land beneath the ocean between the Keys, and the Government of the United States had already granted permission to construct the line over these waters.

About the time this law was passed the engineers had completed their surveys of both routes from Homestead, and it was found that the cost of building to Cape Sable and then across to Key West would be enormously greater than to build across the Bay of Biscayne, and over the Keys into Key West. It was, therefore, definitely determined to build via the Keys. To protect its rights both in regard to the question of purpresture and of taxation the Directors of the Florida East Coast Railway accepted the rights set forth in the Act of 1905. I especially call the attention of the Court (see Chapter 5595 of the Laws of Florida, approved May 3, 1905) not only to the title of the Act but to the prefatory averments.

AN IMOPSSIBLE TERMINUS.

It is further respectfully submitted that the Florida East Coast Railway Company never could have intended to make Homestead a terminus of its main line. An examination of the map will show that Homestead is a place several miles West of Bay of Biscayne, the line of road, however, running parallel with the Bay. As seen from the record, Homestead was simply a name located in the rocky pine woods with no possible connection with any other railroad. The Florida East Coast Railway being completed to Miami controlled all the traffic that could arise along the line to Homestead if the exten-

sion to that point had never been built. It would, therefore, have been a waste of money to have constructed from Miami to Homestead with no purpose or intention of going beyond. The testimony of Mr. Parrott conclusively shows that the line would never have been built South of Miami but for the purpose and intention declared by the Resolutions of the Board of Directors in 1893 to build to Key West. An examination of the map will show that Homestead was the dividing point to determine whether the road should be built from thence on the mainland to Cape Sable and then across the shallow waters of the Bay of Florida to Key West or should be built across the Bay of Biscayne and across the Keys to Key West. The testimony is absolutely undenied and uncontradicted that the work of extension from Miami was begun and prosecuted with the settled purpose of building to Key West. The fact that there was a suspension of the work after it reached Homestead was due solely to the causes already stated, as testified to by Mr. J. R. Parrott, President of the Company.

ORIGIN OF THE CASE.

The order of the Interstate Commerce Commission complained of in this cause was entered November 6, 1911, Florida Fruit and Vegetable Shippers' Protective Association vs. Atlantic Coast Line Railroad Company, *et al.*, 22 I. C. C. Rep., 11, and ordered a substantial reduction, effective January 2, 1912, in the rates charged by appellant for the transportation of citrus fruits and vegetables from the various

points of origin to Jacksonville when for shipment to points beyond the limits of the State of Florida, and established new carload and less than carload rates materially lower than the rates on said articles then in force on said railroad.

On the 26th day of December, 1911, the appellant filed its petition in the Commerce Court of the United States against the United States and the Interstate Commerce Commission praying that said order of the Interstate Commerce Commission, dated the 6th day of November, 1911, might be enjoined, set aside and annulled and further that a temporary injunction might issue enjoining or suspending said order and any and all proceedings thereunder pending a final determination of the suit.

An order was entered by one of the judges of the Commerce Court on the 30th day of December, 1911, granting a sixty-day suspension of said order of the Interstate Commerce Commission. Prior to the expiration of said sixty days, to-wit, on the 25th day of February, 1912, said Commerce Court after hearing granted a preliminary injunction as prayed for in the petition on the execution and approval of a bond in the sum of $100,000 conditioned to repay and refund to shippers on the Florida East Coast Railway the difference between the old rates charged and the new and lower rates fixed by the said order of November 6, 1911, of the Interstate Commerce Commission if the petitioner should fail to maintain its case. Said bond was duly approved and filed and is still in full force and effect. The Railroad Commissioners of Florida, the Florida Fruit and Vegetable Ship-

pers' Protective Association and the East Coast Fruit and Vegetable Growers' Association were granted leave to intervene and became parties to the case. Testimony was taken in St. Augustine, Florida, and at Washington, and the case was argued and submitted on the 26th day of June, 1912. Final decree was entered by the Commerce Court November 14, 1912, vacating the preliminary injunction and dismissing the cause.

The said petitioner and appellant on the 15th day of November, 1912, filed in the said Commerce Court its petition for appeal to the Supreme Court of the United States and Assignment of Errors, and an order was duly entered on said day by the Hon. Martin A. Knapp, Presiding Judge of said court, allowing said appeal and a transcript of the record of said cause in the Commerce Court was on the 27th day of November, 1912, duly docketed in the office of the Clerk of this Court.

The order of the Interstate Commerce Commission complained of in this cause was the outcome of a series of hearings covering several transportation questions involving numerous carriers and extending over a number of years. The original complaint, No. 1168, was filed by the Florida Fruit and Vegetable Shippers' Protective Association on the 3d day of July, 1907, against the Atlantic Coast Line, Seaboard Air Line, Southern Railway, Florida East Coast Railway and other carriers, thirty in all, including several of the main trunk lines, and charged that freight rates on citrus fruits and vegetables from Florida points were unreasonable in themselves

and unreasonable as compared with rates charged Florida competitors, that refrigeration charges were unreasonable and unjust, that no carload rates were furnished complainants from Florida points to Eastern markets on the Atlantic seaboard, and that rates from Florida to these points and to some points in the interior were unjust and unreasonable.

Testimony was taken in this case in Washington February 6, 1908, *et seq.*, and at Jacksonville, Florida, March 18 and 19, 1908. Only one shipper located on the lines of the Florida East Coast gave testimony at these hearings, and his evidence related solely to pineapples. Rates on pineapples are not now in issue. The case was submitted on argument May 11, 1908, and was decided June 25, 1908. See Florida Fruit and Vegetable Shippers' Protective Association vs. Atlantic Coast Line Rd., *et al.*, 14 I. C. C. Rep., 476. All-rail rates on oranges and pineapples from shipping points in Florida to Florida base points were found to be not unreasonable, but carload rates from the base points to the northeastern cities were found unreasonable and ordered reduced. The report of the Commission dealt entirely with rates from base points and the base point on the Florida East Coast is Jacksonville, its northern terminus, and the report and order of the Interstate Commerce Commission did not therefore affect appellant, as appears from the following quotations from the report:

ORANGES.

"Rates from Florida are made up as already seen of the local up to the base point, and the

through rate from the base point. The reasonableness of the local rate may first be considered. * * * These locals up to the base points are in all cases established by the Florida Commission. * * *

"From an examination of the elaborate figures, which were introduced upon the trial showing the character of the traffic handled by these Florida railroads, the conditions under which it is handled, their earnings, and the cost of operation running through a series of years, it is difficult to see how these railroads can be expected to transport in a suitable way this fruit and vegetable traffic from points of production to these basing points for a less sum than they now receive. It is difficult to see how, even upon the present tariff, those lines can in the immediate future expect to pay any considerable return upon their investment. We feel that these local rates, although they are high in comparison with other local rates, are as low as should be established under all the circumstances.

VEGETABLES.

"While these local rates are essentially part of the through charge and should be dealt with by this Commission as such, it is difficult to see how these Florida railroads can render a proper service upon a lower scale of rates than is now applied. It must be remembered that without the railroads this industry could not exist at all, and that to its satisfactory carrying on the character of the service is fully as important as the rate. It is better that these fruits and vegetables should reach the market on time, and in good condition, than that a few cents per box should be subtracted from the carrying charge.

> There was very little complaint as to the service; nor did the shippers who testified manifest any desire that these carriers should be required to accept less than reasonable compensation for that service. Our conclusion upon this branch of the case is that the present rates up to the base point, while high in comparison with similar rates in other localities, are as low as they ought to be under the conditions obtaining upon these Florida lines, so that here, as in the case of oranges, the real question arises upon the rate from the base point to the Northern market."

On June 8, 1909, the same complainant, the Florida Fruit and Vegetable Shippers' Protective Association, filed its petition, No. 2566, in the Interstate Commerce Commission against the same Florida carriers and other railroads, 200 in number, complaining, among other things, of the rates on citrus fruits and vegetables on appellant's line of railroad. Testimony was taken in Jacksonville, Florida, December 20 and 21, 1909. Under date of January 12, 1910, the Interstate Commerce Commission rescinded its former decision in No. 1168 holding rates on fruits and vegetables from points on the Florida East Coast Railway to Jacksonville when for beyond to points in other States to be reasonable, ordered that the reasonableness of those rates be further considered and set the case down for final hearing on February 3, 1910, for the taking of additional testimony, having special reference to rates on pineapples, and for argument. But few pineapples are grown in Florida except on the line of the appellant. Complainant had urged that rates on pineapples

from Florida points should be reduced so as to permit the Florida growers and shippers to meet competition from Cuba. Appellant asked for reasonable time to procure the necessary evidence to show the conditions and cost of raising pineapples in Cuba, but the application was denied. No additional testimony was offered. Cases No. 1168 and 2566 were argued and submitted together, February 4, 1910, and decided by the Commission February 8, 1910. Florida Fruit and Vegetable Shippers' Protective Association vs. Atlantic Coast Line Rd. Co., *et al.* Same vs. Alabama & Vicksburg Ry. Co., *et al.*, 17 I. C. C. Rep., p. 552.

At the hearing in Jacksonville before Commissioner Prouty, in December, 1909, counsel for the shippers declared (p. 1184 of the testimony.)

> "In order to relieve anxiety, I will state that we are not at this time attacking the Florida East Coast rate up to Jacksonville under this petition. * * * * * The petition is confined to rates from the base points to points west."

Commissioner Prouty stated he did not understand the Florida East Coast rates were in issue (p. 1184), and again, that so far as citrus fruits were concerned they were then trying the carload rates from Florida base points to the Ohio River and points north and west thereof (p. 1184).

The first information appellant had that its rates were in controversy was a letter from Commissioner Prouty (Record p. 1186), dated January 13, 1910,

stating that upon the argument of the case the day before the Commission was strongly impressed with the critical condition of the pineapple industry and the disadvantage under which it labored in the matter of freight rates. So strong was this feeling, Mr. Prouty stated, that the Commission issued the order of January 12 above referred to in order to further consider the reasonableness of rates on fruits and vegetables on the Florida East Coast with special reference to pineapples.

Appellant protested against this arbitrary action because (1) it did not give sufficient time to meet the new issue, (2) that the extraordinary crop of 1908 was no fair test of the pineapple industry as was shown by the tremendous falling off of the crop in subsequent years, (3) because the supplemental petition did not raise any issue with appellant except the single one of handling carload shipments at South Jacksonville. No testimony was taken at the hearing ordered for February 3, 1910, because sufficient time was not given appellant to secure the evidence in Cuba necessary in order to make a proper comparison between the cost of raising pineapples in Florida and in Cuba.

The opinion of the Commission, after quoting the second paragraph of the opinion in the former case set forth above, goes on to say:

> "The evidence produced upon the present hearing suggests no change in what was said so far as that applies to the Florida East Coast Railway. That line operates at the present time

477 miles of main line and 106 miles of branches. It has a first mortgage of $10,000,000, a second mortgage of $20,000,000, and a capital stock of $3,000,000, making in all $33,000,000. The capitalization, with the exception of about $4,000,000 represents an actual cash investment.

"It is urged by the complainant that the portion of the line from Miami south, which has cost some $14,000,000, was not at the present time a paying investment and that the balance of the line, from Jacksonville to Miami, ought not to be taxed with the cost of this construction. Admitting this to be so and laying out of view altogether the $14,000,000, which have been invested in that part of the property, it is still true that during the entire existence of the Florida East Coast Railway, so far as this record shows, that property has never earned in any single year 6 per cent upon the money invested, with the single exception of the year 1909. During much of this time its net earnings have been but little above operating expenses. We certainly can not hold that these rates should be reduced because for a single twelve months, under what may be called abnormal conditions, this railway earned about 6 per cent on the money which has been actually invested in its construction. The years when no return has been received must certainly be given some consideration. Upon no other theory could private capital be induced to invest in the construction of railroads.

"While, however, we adhere to what was said in the previous case, we do think, upon more careful examination, that these rates of the Florida East Coast Railway on pineapples ought to be somewhat revised. They are not consist-

ent with one another, and in our opinion those from the more distant points are too high as compared with rates from nearby points.

"The present rates are in any quantity. * * * In our opinion carload rates should be established, which are less than the present any-quantity rates by 3 cents per box.

"The establishment of such carload rates will not of a certainty work a decrease in the net earnings of the carriers. It is a false theory of transportation which seeks to force the shipper to avail himself of a less-than-carload service, which is more expensive to render, for the purpose of increasing the gross revenues of the carrier. The true object should be to perform the service in the most economical manner and to charge for that service reasonable compensation. In the end this makes to the advantage of both the carrier and the patron. The Vice-President of the Florida East Coast Railway stated that he had always thought that carload rates should be established, and that in his opinion to establish carload rates 3 cents per box less than the present any-quantity rates would not prejudice the net revenues of his company, since he would make up by saving in operating expenses what he lost in gross revenue."

The order of the Commission in this case not only reduced appellant's rates on pineapples, but also on other citrus fruits. On the 4th day of April, 1910, appellant moved the Interstate Commerce Commission to rescind so much of the foregoing order as reduced its rates on citrus fruits, and the Commission on the same day in response to said motion en-

tered its order in said case, No. 1168, modifying its order of February 8, 1910, for the following reason:

> "Upon consideration of the record in the above entitled case, it appearing that the rates on oranges and other citrus fruits between the points involved were not specifically assailed in the complaint,"

struck out the words "and citrus fruits" in said order, the new order read,

> "for the purpose and with the intention of making said order apply only to the transportation of pineapples, as therein set forth."

Thereupon, on the 16th day of November, 1910, complainant filed in No. 1168, in the Interstate Commerce Commission, its supplemental petition attacking appellant's rates on citrus fruits and vegetables. On February 1, 1911, the Railroad Commissioners of the State of Florida filed their petition of intervention, asking that appellant be ordered to reduce its rates on citrus fruits and vegetables, and to put into effect rates on carload and less than carload lots for citrus fruits not in excess of the rates then in effect on pineapples, and to reduce the rates on vegetables when for beyond Jacksonville to an equitable proportion of those permitted for pineapples.

The Railroad Commissioners of Florida on the 28th day of January, 1911, filed a petition against the Seaboard Air Line, Docket No. 3808, and on the same day, a petition against the Atlantic Coast Line, Docket No. 3808, Sub. 1, asking for the establishment on these railroads of the same rates they had

asked to be fixed for the appellant. Testimony was taken in these three cases at Jacksonville, March 2, 1911. This was the first hearing at which appellant's rates on citrus fruits and vegetables were specifically attacked. The fact that appellant's rates on pineapples had been reduced, which reduction had been accepted by the appellant, seemed to be relied on by the complainant and the Railroad Commissioners of Florida as a conclusive argument why oranges should be carried for the same rate as pineapples, and that vegetables should be carried at a lower rate. Counsel for the shippers said (p. 1513 of that hearing) that the record as to vegetables was very voluminous and they merely expected to show at that time that the volume of business had largely increased and freight earnings had vastly increased, and on the crop then moving would increase more. Commissioner Prouty, who presided at the hearing, declared that the case would be decided on the old record, not on new testimony, but on the testimony taken in the old hearing (p. 1513, etc.); that the rates on citrus fruits and perhaps on vegetables would be revised on the strength of the decision already made on pineapples, and on the same record (p. 1513 and 1514); that he thought the Commission should probably establish carload rates, but he did not think it would revise the former holding as to the reasonableness of less than carload rates (pp. 1513 and 1514, 1557 and 1558). Counsel for the Railroad Commissioners of Florida confirmed this view, saying (p. 1570):

> "I understand the feeling of us all to be that we will submit this matter on the testimony al-

ready in these cases in regard to the carload rates, which have been discussed here. We do not at the present time desire to make a re-examination of the whole question such as was made here at the first hearing your Honor held in the city of Jacksonville."

The only new testimony of any importance offered at this hearing on behalf of the shippers was given by Mr. Burr, chairman of the Railroad Commissioners, who testified that it was estimated by shippers that 10,000 cars of tomatoes would be shipped from Dade County (the old county before Palm Beach County was created) in the season of 1911. As a matter of fact, shipments of all vegetables that season were less than 6,000 cars.

At this hearing Commissioner Prouty admitted that it cost appellant more to operate than it cost to operate the Seaboard Air Line and the Atlantic Coast Line, and for that reason appellant was entitled to charge a little higher rate. Notwithstanding this admission, the Commision, by its report and decision of November 6, 1911, ordered into effect on appellant's lines a reduction in rates which averaged 20 per cent on citrus fruits and vegetables and which were the same rates put into effect at the same time on the Seaboard Air Line and the Atlantic Coast Line. (See Florida Fruit and Vegetable Shippers' Protective Association vs. Atlantic Coast Line Rd. Co., *et al.*, 22 I. C. C. Rep., 11.)

The report of the Commission, comparing conditions when the order complained of was made with conditions as they existed when the first report was

made in 1908 when higher gathering rates were sustained, said:

> "No material change has taken place since then so far as this record discloses which would lead to a different conclusion if the same subject were before us today. The volume of business transacted has increased, but the expenses of operation have also increased to an extent which offsets the greater amount of business."

The commission reported (pp. 23 and 24) it found a material difference in one respect between 1911 and 1908, and that was in the movement up to the base point, that the carload movement had greatly increased, and the cars were loaded much heavier than formerly, thus reducing operating expenses. There was no evidence, however, that such changed conditions did prevail on appellant's line, though they apparently did obtain on the other two lines involved in the hearing. Neither were appellant's operating expenses thereby reduced.

Among the considerations affecting the hearing of the Commission appears the following (pp. 26 and 27):

> "It was said that the present rates had been agreed upon by the railroads and the Florida Commission, in view of these competitive conditions, and that the relation of rates was satisfactory. It is also true that upon this hearing no particular locality was complaining of its rate as compared with other localities; but since the conclusion of the hearing the Commission has received in several instances petitions from

different points of production insisting that the rates from these points were too high as compared with other points, and the proposed schedules of the Florida Commission suggest a much greater reduction from present rates and more distant than at nearby points."

ASSIGNMENTS OF ERROR.

We have endeavored to make the number of assignments of error as few as possible so as not to weary the Court with a longer brief than this must necessarily be.

FIRST ASSIGNMENT OF ERROR.

"The Court erred in holding that the Interstate Commerce Commission had the power to make and fix the rates complained of."

It is submitted that this assignment of error is well taken. The authority of the Interstate Commerce Commission in this respect cannot be arbitrarily exercised neither is it unlimited. This authority is and must be limited to enable it to be constitutionally exercised. If the authority is exercised in an unreasonable manner so as to deprive the appellant of due process of law, then we submit that this Court will not sustain the Interstate Commerce Commission or the Commerce Court in their holding. In fixing rates the Commission did not consider the entire business of the company, the present value of its property and reasonable net earnings, and we submit that the action of the Commission in deciding as it did deprived the appellant of due process of law, took its property without giving it due compensation

and literally confiscated $16,000,000 worth of this appellant's property. The bases of the present proceeding was the arbitrary reduction of the rate on pineapples, although at the hearing both counsel for complainants and the Commissioner presiding declared that the rates of this appellant were not in issue. At this hearing the appellant demanded that if there was to be any further reduction of rates it should be given an opportunity to show the present value of its property. Mr. Commissioner Prouty, who presided at the taking of the testimony held that the Commission could not use that basis at all in fixing rates. (See pp. 1566 and 1569 of the record). Time was demanded to ascertain the cost of production in Cuba as compared with the cost of production in Florida and this was refused; and the decision was based upon ex parte statements of the complainants without giving this appellant time to put in any testimony at all to meet this evidence.

To avoid conflict this arbitrarily reduced rate was put in effect, the record, however, showing that the pineapple growers insisted that they were entitled to a lower rate than was given on vegetables and citrus fruits because of the competition with Cuba in pineapples and because of the greater cost of producing the pineapple in Florida, while the average price per crate did not differ materially and was, in fact, frequently less than the average price per crate for oranges and vegetables. Because the rate on pineapples had been reduced the complainants before the Interstate Commerce Commission demanded a reduction of the rates on vegetables and oranges. At the

hearing Mr. Commissioner Prouty declined to take any new testimony, but held that the new petition should be decided on the testimony taken in the previous case. (p. 1513 of record).

In the decision itself the Commission stated that after the hearing (and without notice to the appellant) it received ex parte statements from parties which unquestionably affected its decision.

This Court has held that the substance and not the shadow determines the validity of the exercise of the power vested in the Commission. It has also held that the hearing which must precede an order taking property must not be a mere form, but one which gives the owner the right to secure and present material evidence.

> Oregon R. R. & Nav. Co. vs. Fairchild, 224 U. S., 510.

And the following cases are conclusive of the proposition here advanced:

> I. C. C. vs. Union Pac. R. R., 222 U. S., 541;
> I. C. C. vs. Ill. Central R. R., 215 U. S., 452;
> Southern Pac. R. R. vs. I. C. C., 219 U. S., 433.

In the case of Interstate Commerce Commission vs. Union Pacific R. R. Co., supra, this Court held that:

> "An order of the Commission, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking

> property without due process of law; or if the Commission acted as arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support its conclusions; or if the authority was exercised in an absolutely unreasonable maner."

We submit here that, as admitted by the Court, the effect of the order complained of would be to reduce the revenues of the Company $131,000 per annum; that it was made upon the same testimony previously taken when the rate was higher than the one in force and which higher rate had been declared reasonable, the Interstate Commerce Commission holding that they did not see how the road could afford to haul the vegetables and citrus fruits at a lower rate than then charged. Effective July, 1910, the railroad company had voluntarily reduced the carload rates by an average of 4c per crate; and this order, without any testimony, further reduced the rates by an average of 4c more per crate, although the Interstate Commerce Commission in its decision held that the conditions were unchanged, while the evidence shows that they were changed, but only to the extent of making the situation less favorable to the railroad company than it was in 1908, since, while the gross receipts of the company had increased, its expenses had increased to a greater extent than the increase of business.

The determination of the pineapple rate was made without due process of law, and the decision in 1911 on the rates on fruit and vegetables was also made without due process of law. It had for its effect the

taking of the property of the company to the extent of $131,000 annually in violation of the Constitutional prohibition against taking property without due process of law. It was made arbitrarily and unjustly contrary to the evidence and without evidence to support its conclusion.

I. C. C. vs. Union Pac. R. R. Co., supra.

Due process of law requires that proper notice shall be given and that an opportunity to appear and to produce evidence be allowed.

The authorities on this point are so uniform and conclusive that we submit it requires no citations of authorities.

In this proceeding in 1911 the Interstate Commerce Commission, of its own accord, reopened the case of 1908 and declined to permit any additional testimony to be taken. The only thing in the nature of evidence that appears in this regard or that was received was the opinion of the chairman of the State Railroad Commission that the next winter crop would amount to 10,000 cars (see page 1519 of record); and the opinion of the Vice-President of the Florida East Coast Railway Company that it would not exceed 7,000 cars (see page..... of record). As a matter of fact, it was only 6,000 cars. If this was the "evidence" upon which the Commission reversed its former holding in 1908, then it is submitted that the Commission is not empowered to fix rates on this basis, but upon the actual business done or doing by a railroad. This would be the veriest speculation in

futures. Besides, the admission of the Commission in its decision that the condition of the road was the same in 1911 that it was in 1908 is conclusive that it was without evidence to support its conclusion that the rate should be still further reduced.

The following decisions of the Federal Courts sustain our contention on the Constitutional question here raised:

Chicago, Milwaukee & St. Paul Ry. Co. vs. Minnesota, 134 U. S., 418;

Milwaukee Electric Ry. & Light Co. vs. City of Milwaukee, 87 Fed., 577;

Central of Georgia Ry. Co. vs. Railroad Commissioners of Alabama, 161 Fed., 925;

Covington & Lexington Turnpike Road Co. vs. Sanford, 164 U. S., 578;

Dow vs. Biedelman, 125 U. S., 680;

Chicago & Grand Trunk Ry. vs. Wellman, 143 U. S., 339;

Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362. (See page 399).

SECOND ASSIGNMENT OF ERROR.

"The Court erred in holding that said rates were not confiscatory."

In the decision of the Commerce Court it is admitted that the effect of the reduction applied to the tonnage of the year ending June 30, 1911, would be to reduce the revenues of the company by $131,000, being about 3% of the gross and 10% of the net operating revenues of the main line; which main line the

Court erroneously and arbitrarily decided terminates at Homestead in the pine wods. What is confiscation? Is it necessary that the appelant should, by reason of the rates, be forced to expend more in the operation of its road than it receives to constitute confiscation? Is it not protected by the Constitutional provision that it should receive fair compensation for the service rendered and that it should earn a fair profit on the present value of its property, as has been so repeatedly decided by this Court?

The only evidence before the Court was that it had earned $1,300,000 net revenue during the fiscal year ending June 30, 1911; that it had paid 4½% on its first mortgage bonds and 4% on its second mortgage, or income, bonds, leaving a surplus of $67,000, which included some $25,000 not earned in the operation of the road but from interest on its deposits of money. The only evidence before the Court was that the present value of the road exceeded $20,000,000 from Jacksonville to Homestead, without considering the extension to Key West at all, which would make the net earnings of the road but a trifle over 6% on the present value of the property to Homestead and giving to so much of the line as a gift all the increased business, especially in passengers, produced by the extension to Key West. A loss of $131,000 from this net income would reduce the net earnings on the present value of the porperty from Jacksonville to Homestead to but a little over 5%.

We shall describe under another assignment of error the method by which the learned Court below

fixed what it considered a present fair value of the line to Homestead. It is submitted, however, that the loss of this revenue reducing its earnings nearly 3% below the value placed on money by the laws of Florida is confiscation, and is a violation of the Constitutional provision that guarantees to this appellant fair compensation for services rendered. We contend further that a fair valuation of the entire line to Key West based upon the present value per mile of the line from Jacksonville to Homestead, with the branches, reduces the earnings of this appellant to less than 4%, or less than half the legal value of money as fixed by the laws of Florida. This we submit is confiscation.

Taking property without due process of law we submit is confiscation. Reducing rates without evidence to support the conclusion that they should be reduced, thereby inflicting a large loss of revenue upon a railroad, is also confiscation.

In the case of Spring Valley Water Work Co. vs. City of San Francisco, 124 Fed., 574, it was held that 4.4 per cent income on the value of that property was unreasonably low and confiscatory, and amounted to the taking of private property for public use without just compensation, thereby depriving the complainant of its property without due process of law.

And the same position was taken in the same case in 165 Fed., 657. And to the same effect Des Moines Water Co. vs. City of Des Moines, 192 Fed., 193.

This case is somewhat similar to the case of Smythe vs. Ames, 169 U. S., 466, where it was shown, as in this case, that there had been a de-

ficit for a number of years and that when the road commenced to earn something the rates were reduced, and this Court held to further reduce the rates was confiscatory.

THIRD ASSIGNMENT OF ERROR.

"The Court erred in holding that the main line of the petitioner's railroad ends at Homestead and that the net revenues on this alleged main line are in excess of eight per cent on the present fair value of the property."

In the consideration of this assignment, before discussing it, we call the attention of the Court to the decisions which hold that the policy or wisdom or necessity of the construction of the extension to Key West is not a subject of judicial review when the facts in this case are considered.

Florida Central & P. R. Co. vs. Bell, 43 Fla., 359;
Ulmer vs. Line Rock R. R. Co., 98 Me., 579;
Price vs. Pa. R. Co., 209 Pa., 81;
Boston, etc., vs. Bos. & W. R. R. Co., 40 Mass, p. 60.

It is submitted that the learned Court below was radically in error when it held that the act of the railroad company in deciding to extend the line to Key West was not determined until 1905. This is in conflict with the undisputed evidence:

(1) That the railroad company in 1893, by a formal act of its Board of Directors changed its route so as to build over Biscayne Bay to Key West.

At that time it had not completed constructing to Miami on the Bay of Biscayne.

(2) That it formally, in compliance with law, certified the action of the Board of Directors and filed its action with the Secretary of State.

(3) That at this time the ownership of the Panama Canal was not even settled.

(4) That it commenced the work of extension to Key West and had reached Homestead before the Act of the Legislature of 1905 was passed.

(5) That it had no part in and took no part in the Act of the Legislature of 1905, as shown by the testimony of Mr. J. R. Parrott. (Page 718 of record).

(6) That the Board of Trade of Jacksonville appointed a committee to urge action so as to settle the disputed question of the right of purpresture and the question of taxation.

(7) That the action of the Legislature of Florida placed the wisdom or unwisdom of the extension beyond judicial question.

At the risk of being prolix we quote the title of the Act and the prefatory declaration:

"An Act to Encourage and Secure the Construction of a Line of Railway from the Mainland of Florida to Key West; to Provide for a Fair and Equitable Assessment of Taxes of the Corporation Constructing It; and to Grant Right of Way Over the Submerged and Other Lands Belonging to the State, and Over the Waters of the

On page 6, by typographical mistake, the chapter is given as 3595 of the Laws of 1905. It should be chapter 5595. The body of the Act is as follows:

Be it Enacted by the Legislature of the State of Florida:

Section 1. That any existing railroad corporation in this State which shall, within three months after the passage of this Act, and its approval by the Governor, file in the office of the Secretary of State a plat showing a surveyed route and line of railroad definitely located and described, from the mainland of Florida to the Island of Key West, shall on complying with the other provisions of this Act, have the right to construct and operate a line of railroad from said mainland of Florida to the Island of Key West.

Sec. 2. That the corporation so filing the plat as set forth in the first section of this Act shall begin the actual work of construction within six months from the filing of the same, and shall have said railroad completed and in operation to Key West within seven years after the passage of this Act.

Sec. 3. That from the passage of this Act the assessment for taxes per mile of the entire line of road within the State of Florida of the corporation constructing said line of road from the mainland of Florida to the Island of Key West shall not be fixed at a greater sum per mile than the average assessment per mile of all other lines of railroad operated within the State of Florida.

Sec. 4. That the line of railroad from the mainland to the Island of Key West shall be held and considered for the purpose of assessment

of taxes the same as if it had been built on the mainland and at no greater expense.

Sec. 5. That the corporation so filing the plat as set forth in the first of this Act shall within three months after the filing of said plat, as set forth in Section 1, execute to the State of Florida a good and sufficient bond with sufficient sureties thereon, in the sum of twenty-five thousand dollars, conditioned for the letting of contracts and the employment of labor in the actual construction of the work of said road connecting the mainland of Florida with the Island of Key West within six months after the filing of the plat showing a surveyed route and line of railroad definitely located and described, the sum of money mentioned in the said bond to be forfeited to the State of Florida if the actual work of construction on said line of railroad from the mainland of Florida to Key West is not actually begun and prosecuted in good faith within six months from date of the passage of this Act and its approval by the Governor.

Sec. 6. That the corporation constructing said line of railroad from the mainland of Florida to the Island of Key West is hereby granted a right of way for the width of 200 feet on each side of the railroad over and through the land owned by the State of Florida on the line of its road and the right of way over the waters of the State two hundred feet on each side of the road bed, and shall have the right to fill in, occupy and use the submerged lands of the State on the line of its road for two hundred feet on each side of the line of road bed and to construct trestles, concrete arches and draw bridges over and on such submerged lands, build docks, warehouses, depots and other buildings over and on said sub-

merged lands, and hold and occupy, and use for its corporate purposes all lands made by filling in the submerged lands on its line of road and trestles over and through the waters connecting the mainland with the Island of Key West: Provided, That any corporation, firm, person or persons constructing any new line of railway as provided for in this Act or any previous Act, shall neither have nor claim from this State any land or grant of land for such extension or for any part thereof, from the mainland to the Island of Key West, except the 200 feet on each side of aforesaid railway, as provided in this Act.

Sec. 7. That all the laws or parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

Sec. 8. That the provisions of this Act shall take effect from and after its passage and approval by the Governor.

Approved May 3, 1905.

State, and to Authorize the Filling of the Submerged Lands, and to Construct Buildings, Docks and Depots Thereon.

"Whereas, The construction of the Panama Canal renders it desirable and important for the proper development of the State of Florida, and to secure the State a fair proportion of the traffic passing through the said canal, that a line of railroad should be constructed from the mainland of the State to the Island of Key West; and

"Whereas, To connect the mainland with the Island of Key West will require the construction of nearly one hundred and fifty miles of railroad, a large portion of which must necessarily be over rocky islands and through the waters of the State; and

"Whereas, It is estimated that the cost of properly constructing and equipping said line of railroad will aggregate many millions of dollars; and

"Whereas, It is desirable that said line of railway shall be constructed as speedily as possible, and that pledges shall be given by the State of Florida, that will encourage the investment of the capital needed for the construction of said great highway of traffic."

It is submitted also that there is no evidence upon which the Court could properly hold that the net revenues of the main line as fixed by the Court at Homeare in excess of 8% on the present fair value property. The evidence as to the present value e property was put in by the appellant. It emyed experts, engineers, railroad men, real estate

agents, building contractors, and others to visit every portion of the line from Jacksonville to Homestead and the branches to make an examination of the property, its buildings and equipment, and to give an estimate of the present cost of reproducing it. The testimony of these witnesses showed an aggregate present valuation of over twenty millions of dollars. Against this all that the appellees had to offer was the Plant Account showing not what it even originally cost to build the road but solely what the Plant Account showed Mr. Flagler had paid for the several properties now comprising the Florida East Coast Railway. It was shown that the price he paid was not what it cost to construct this road. For instance, the branch from Titusville to Enterprise was purchased for $74,900, which was less than the rails on it would have cost. (Page 338 of record). So likewise the line from New Smyrna to Orange City Junction, which was purchased for $100,000. (Page 337 of record).

The record shows that these lines cost to build them considerably more than Mr. Flagler paid for them. Again, the evidence also shows that the right of way and the lands used for building shops, yards, etc., has a present value of over three millions of dollars, while the Plant Account shows only an expenditure of only approximately $300,000 for these lands. A large part of these lands and right of way were given to Mr. Flagler and by him turned over to the road or donated directly to the road, but we clearly have a right to have their present value taken into consideration since to rebuild this road now w

would have to pay for every foot of ground. The buildings, equipment, ties and bridges were all shown to be in first class condition, approximately as good as new, as they necessarily must be for successful operation. The appellees admitted the fine condition of the road; they declined to put in one word of evidence conflicting with the testimony offered as to present value, but rest their claim solely upon the Plant Account, which did not and necessarily could not represent the present value for it was shown that the price of land had enormously increased in value since the construction of the road; that the cost of lumber, building material and ties had largely increased; that the cost of grading, cutting right of way and building trestles had enormously increased. It follows, therefore, that the only estimate of present value in evidence gives the value of the line from Jacksonville to Homestead, with branches, at over Twenty Millions of Dollars.

It was clearly error on the part of the learned Court below in its allegation that we had earned exceeding 8% on the present fair value.

It has been held by this Court that the reasonableness of rates to be charged by a public corporation should be based on the fair value of the property at the time of fixing the rates.

Smythe vs. Ames, 169 U. S., 524;
San Diego Land & Town Co. vs. Jasper, 189 U. S., 19;
Wilcox vs. Gas Co., 212 U. S., 19;
L. & N. R. R. Co. vs. Brown, 123 Fed., 946.

In the case of Pennsylvania Railroad Company vs. Philadelphia County (220 Pa. State, 115) 68 Atlantic Rep., 676, the decision which declared the two cent per mile rate established by the Legislature unconstitutional, said:

> "Public service corporations in Pennsylvania are entitled to look for a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly requisite to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property cannot be said to be unreasonable."

On page 679 the Court further says:

> "What is a fair profit is a complicated and difficult question; but there are certain elements that are plainly to be regarded to avoid injustice, such as the original investment, the risks assumed at that time, the returns as compared with other enterprises as nearly similar as may be, the cost of maintenance and improvement, the prospects of increase, and the present value in view of the preceding elements. Injustice is done by anything that fails to consider these and to deal equitably with the private as well as the public interests involved. It is not necessarily regulated by what others would now make the venture for under the present circumstances and with present knowledge. The public having long reaped the incidental profits from the development of the country by

the enterprise and venture of capital in the increased value of land, the opening of new and wider markets for crops and manufactures, and the facility of intercourse and exchange for persons and property the courts should not now ignore the aspect of the subject in considering the question of injustice to the corporators. In view of the evidence before the Court and the proper elements with which it must be considered, the Court below certainly did not err against the appellant in finding that the statutory rates of fare would do injustice to the corporators."

"It only seeks revenue enough to pay interest on bonds, to pay operating expenses, and to pay taxes. Present rates, under the experience of 1894, were insufficient for such payment. The elements of the controversy will be stated as we proceed. It may, however, be premised here that Mr. Justice Brewer said in the Dey case: 'Compensation implies three things, payment of the cost of service, interest on bonds, and then some dividend;' 'adequate dividend,' subsequent cases say. These, then, are the factors of compensation to be applied."

The following decisions also hold the right of a railroad company to earn its operating expenses and fixed charges and a reasonable profit on the present value of its property:

Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 402;

Lake Shore & M. S. R. Co. vs. Smith, 173 U. S., 684;

Minneapolis & St. L. R. R. Co. vs. Minne-

sota, 186 U. S., 257;
Consolidated Gas Co. vs. Mayer, 146 Fed., 150;
Chicago vs. Tompkins, 176 U. S., 167;
A. C. L. R. R. Co. vs. Florida, 203 U. S., 256;
Stanilaus County vs. Irrigating Co., 192 U. S., 201;
Southern Pac. R. R. Co. vs. Board of R. R. Com., 78 Fed., 236;
Milwaukee Electric Ry. & Light Co. vs. City of Milwaukee, 87 Fed., 577;
Chicago Union Traction Co. vs. State Board of Equalization, 114 Fed., 537;
Central of Ga. R. R. Co. vs. Railroad Commission of Alabama, 161 Fed., 925.

And the Interstate Commerce Commission itself has recognized the right of the railroad company to earn as a profit the interest named by the laws of the State at the value of money.

See also:

4 I. C. C. Rep., 560;
174 U. S., 739;
164 U. S., 578;
107 U. S., 691

The testimony in this case as to present value is as follows:

The estimated cost of rebuilding from Homestead to Jacksonville, with branches, made by Colonel Elliott and Major Huger in 1907, was $6,810,374,33 (see Exhibit 3, page 37 of Exhibits). Of this

sum $2,201,953.33 were for rails and fasteners, on which there has been no increase in price, the same amount being paid for steel rails and fasteners now as was then paid. This leaves $4,608,420.67 as the then estimated cost of reproducing the road. It was shown from the evidence:

(1) That the cost of grading had increased from 20c to 24c per cu. yd.

(2) The cost of trestles had increased from $6.01 to $8.50, or over 40 per cent. increase.

(3) The cost of trestle timbers had also increased from an estimated average by Colonel Elliott of $14.00 to from $22.00 to $25.00.

(4) The price of labor had increased from 25 per cent. to 40 per cent.

An analysis of the different amounts of material put in the road, the number of cross-ties, the number of cu. yds. of grading, show a present average increase in cost of construction of about 24 per cent., making an estimated increase in the cost of construction of $1,106,030.00 (as compared with 1905) which makes a total present cost of construction, including steel rails, etc., of $7,916,394.00. This is exclusive of equipment, buildings, machinery, tools and stock on hand, etc.

This represents the present cost of reconstruction of the road as it was in 1907 without the betterments and improvements put upon it since.

The present value of the property, therefore, would be as follows:

Present cost of construction of main line from Homestead to Jacksonville, and branches north of Miami as compared with 1907	$ 7,916,394.00
Betterments and improvements since July 1, 1907	1,502,126.00
Present value of lands	3,029,210.00
Present value of buildings in existence in 1907	1,287,963.00
Machinery and tools	113.061.00
Stock on hand	795,407.00
Present value of equipment	3,343,048.00
Cash capital, as per testimony of Mr. Parrott	700,000.00
Value of half interest in steamship line	500,000.00
Value of one-fourth interest in terminal property	450,000.00
Value of half interest in A. C. L. R. R. and F. E. C. Ry. freight terminal	400,000.00
Purchases of land since 1907	91,000.00
New buildings constructed since 1907	90,000.00
Total	$20,218,609.00

As will be shown in the argument on the seventh assignment, the Interstate Commerce Commission and the Commerce Court were compelled to include in their estimate of the earnings all the business brought to the balance of the road by the extension while depriving the extension of any benefit whatsoever except local traffic between Homestead and Knights Key or Key West. They refused even to

consider placing a valuation on the line from Homestead to Key West at the same average per mile as the value of the balance of the system regardless of the greatly increased cost of construction from Homestead to Key West; and this estimated valuation placing the whole line on the same basis would have increased the present value to about $26,500,000, or a fraction over 5% and less than 4% on the total shown investment of $35,000,000.

FOURTH ASSIGNMENT OF ERROR.

"The Court erred in holding that it was not until May, 1905, that the petitioner decided to construct its extension to Key West."

We confess to surprise at finding this in the decision as it utterly ignores several undenied and undisputed propositions:

(1) That in 1893 the Board of Directors, by formal action, decided to build from Miami to Key West.

(2) The testimony of Mr. Parrott, the President of the road, that when it commenced building from Miami southward it was with the purpose and intention of building to Key West.

(3) That the delay at Homestead, which was only for a few months, was to definitely determine which route should be taken to build into Key West, Homestead being the point from which the extension could continue on either route.

(4) That, but for the fixed and officially declared purpose to build to Key West the extension

to Homestead from Miami would never have been made.

(5) That, as the line of extension was completed, it was operated as part of the main line from Jacksonville and is still so operated.

Clearly and unmistakably it was an error of the Court below to have held that it was not until May, 1905, that the appellant decided to construct its extension to Key West.

Presumably the Commerce Court came to the conclusion that the determination to build to Key West was not arrived at until after the passage by the Legislature of the Act of 1905, but to do so it had to ignore the undenied testimony that the Company was already building to Key West; that the only purpose in accepting the Act of 1905 was not to determine to build to Key West, as that had been determined twelve years before, but to secure the benefits conferred by the Act in the matter of taxation and to settle the question of right to build over the waters between the keys.

It is submitted that the conclusion of the Commerce Court in this respect is not only not sustained by evidence, but is in conflict with the record evidence of the action of the Company in 1893 and the testimony of its President, Mr. Parrott.

FIFTH ASSIGNMENT OF ERROR.

"The Court erred in holding that the Interstate Commerce Commission was justified in disregarding the value of this extension in fixing the rates

complained of."

We have been unable in all our researches for months past to find a case in which even the judicial authority has ever been exercised in holding that in fixing rates one part of the main trunk of a railroad line could be ignored and only other parts considered. We have endeavored to show that this power could not be vested in a Court and clearly it could not have been vested in the Interstate Commerce Commission.

All the authorities we have been able to find are to the effect that no authority in law exists to single out part of a road, ignore it, and to fix rates based solely upon the earnings or cost of construction of the other part.

F. H. Peavey & Co. vs. Union Pacific R. Co., 176 Fed. Rep., 409;
Postal Tel. & Cable Co. vs. Adams, 155 U. S. 698;
Mo. K. & T. R. Co., *et al.*, vs. I. C. C., 164 Fed., Rep., 647.

And Mr. Commissioner Prouty, who presided at the taking of the testimony, himself admitted this. Counsel for appellant had insisted that before further reduction could be made the company should be afforded an opportunity to show what the present value of the property was. In the proceedings before the Interstate Commerce Commission the following colloquy occurred: (page 1566 of record).

Mr. Commissioner Prouty: That is one rea-

son we cannot use that basis at all.

Mr. St. Clair-Abrams: Exactly, therefore I say this Commission must consider the entire system—

Commissioner Prouty: *We must consider the entire system but at the same time we cannot assume that there is any traffic which justifies, up to the present time, the construction of that extension.*

Mr. St.Clair-Abrams: But will the commission not consider the enormous increase of business that extension has given to the main line, which amounts to $4.00 for every one that the extension itself gets?

Commissioner Prouty: We will try to fix the reasonable rate, and if you can make your extension pay you are entitled to the benefit of it. *If it does not pay the public ought not to be required to make good the loss.*

Mr. St. Clair-Abrams: But if the public on the main land is getting four or five dollars for every dollar earned on the extension, will the commission say they must get that benefit and we derive no benefit from the extension at all?

Commissioner Prouty: I say I do not think the Commission will undertake to settle the question which is before us on a revenue basis at all.

It will be noticed that Mr. Commissioner Prouty admitted that the Commission must consider the entire system, but proceeded judicially to assert a right to ignore the extension because, as appears from the showing of its expert, the local freight traffic from Homestead to Knights Key and afterwards to Key

West was not large.

It is submitted that the Commission was without power to do this and that the Commerce Court was equally without power to accept this as the basis of the appellant's business.

In another assignment we will show that the benefits conferred upon the main line from Jacksonville to Homestead were really enormously larger than we claimed, and that the record of evidence put before the Commerce Court and which we tried to put before the Interstate Commerce Commission, but were not permitted to do so, is conclusive of the great benefit conferred upon the balance of the main line by this extension.

The evidence is conclusive that the main line of the road is from Jacksonville to Key West. In both freight and passenger trains the same cars leaving Jacksonville run unbroken to Key West, the only difference being in the number of trains. For a few weeks in the winter, two and sometimes three trains are run from Miami to Key West; in the summer one train each way. On the balance of the main line from Jacksonville to Miami during the summer months two trains are run each way; during the winter months, five. The very fact that as many as three trains each way are needed from Miami to Key West is itself conclusive of the large amount of business that the extension to Key West furnishes; the passenger traffic from Miami to Homestead being trifling and inconsiderable.

It must not be forgotten that no trains are run

separately from Homestead to Key West or back. The only difference at Miami is that, to comply with the law regarding the hours of labor, a new train crew is put on each train at Miami and a fresh locomotive, just as is done at another point between Jacksonville and Miami.

SIXTH ASSIGNMENT OF ERROR.

"The Court erred in deciding that there was evidence before the Interstate Commerce Commission that the conditions existing in 1911 were any different from those existing in 1908 to warrant a further reduction of rates."

We have cited in the statement of the case the language of the Commission where they distinctly hold that the conditions were not different. We submit that this opinion of the learned Court below is directly in conflict with the decision rendered by the Interstate Commerce Commission itself in 1911. Referring to its decision in 1908, where it held that the then higher rates were reasonable and that the Commission could not see how the appellant could transport freight for less than it was doing, the Commission says:

"No material change has taken place since then, so far as this record discloses, which would lead to a different conclusion, if the same subject were before us to-day. The volume of business transacted has increased, but the expenses of operation have also increased to an extent which offsets the greater amount of business."

The appellant offered then to show to the Commission and was not permitted to do so, but did show to the Commerce Court, that, while the business of the road in the aggregate had increased since June 30, 1911, the expenses had increased to a greater extent than those receipts, and we may be permitted to add that during the fiscal year ending June 30, 1912, its net earnings had decreased to such an extent that, instead of being able to pay 4% on its second mortgage, or income, bonds, it could only pay 2½%.

As a matter of fact, as this record discloses, the condition in 1911, when the Interstate Commerce Commission rendered its decision, was less favorable to the appellant that it was in 1908. It was, therefore, error on the part of the learned Court below to hold that the conditions in 1911 were different from those existing in 1908, so as to warrant a further reduction in rates; and it seems largely upon this erroneous idea that the Commerce Court sustained the action of the Interstate Commerce Commission.

SEVENTH ASSIGNMENT OF ERROR.

"The Court erred in deciding that there was no evidence to justify it in holding that the extension produced any considerable increase of travel on the main line from Jacksonville to Homestead."

As this Court has held in the case of Interstate Commerce Commision vs. Union Pac. R. R. Co., 222 U. S., 541:

"An order of the Interstate Commerce Com-

> mission is not to be considered by itself alone, but must be considered in the light of all the testimony."

In the case of Interstate Commerce Commission vs. Chicago, Rock Island & Pac. R. R. Co., 218 U. S., 88, this Court sutsained the proposition that a railroad company may complain of an order of the Commission reducing rates so far as it affects its revenue.

An examination of the testimony in this case completely rebuts the idea that there were no benefits derived from the extension. The testimony for the appellant was that prior to the building of the extension from Miami to Knights Key the bulk of the passenger traffic to Cuba was via Tampa; that after the extension was completed and put in operation to Knights Key the business to Havana enormously increased, and at the time of the witness' testifying a large majority of the travel to Havana was via the Florida East Coast Railway and not by way of Tampa. It was also shown by the evidence before the Commerce Court that the completion of the line to Key West had resulted, up to the time of testifying, in a still larger increase of travel over the line of the Florida East Coast Railway. (See pages 734, 735 and 736, etc., of record). Witnesses for the appellant testified to the fact that there was very little local traffic from points on the Florida East Coast Railway, that there were few Cubans or Spaniards residing at Miami or anywhere else on the Florida East Coast Railway, and that over 90% of

those who travel on the extension south of Miami come from Jacksonville. Of course, it is impossible to prove that every person who went over the extension would not have traveled as far as Miami but for the extension, but the record of the enormous increase of passenger traffic after the completion of the extension to Knights Key for the fiscal year ending June 30, 1911, was $319,547.07; and an examination of the travel to Cuba and its increase shows it to be in equal proportion, thereby demonstrating, with as much certainty as it is possible to arrive at, that this extension caused this increase. It may almost be claimed that Court will take judicial cognizance of the widespread interest created throughout the entire world by this line of road. Since its completion to Knights Key it has every winter been the Mecca of tourists, not only from all parts of the United States, but from all parts of the world. The percentage in increase in passenger earnings has been greater than the percentage of increase of freight earnings. The increase of freight earnings for the fiscal year ending June 30, 1911, as shown by the record (page 1082 of record) over the freight earnings for the fiscal year ending June 30, 1909, was about 22%, while the increase of passenger earnings for the fiscal year ending June 30, 1911, over the passenger earnings for the fiscal year ending June 30, 1909, was nearly 30%; and it must be borne in mind that the bulk of the increase of freight was on the line of road from Miami to Homestead.

The entire business of the road from passenger and freight earnings increased in 1911, $721,153.26,

of which increase $554,055.83 was on the extension from Miami to Knights Key, and we insist that more than two-thirds of this increase was from the passenger traffic in winter over this extension, the business of the balance of the road increasing only $167,097.43. Perhaps no fact is more clearly shown in the testimony before the Commerce Court (see pages ..... of record) and no fact more notoriously obvious to every person familiar with the road than the extension of that road from Miami to Knights Key and Key West has attracted thousands of persons anually who had never been on the line of the road before, and the vast majority of whom would probably never have come to Florida in the winter but to travel over and see this novel railroad, and that this travel has steadily increased in volume every year. As shown by the record (pages ..... of record), before the road was constructed to Miami the winter travel to Nassau was by way of steamer from Jacksonville and from New York. This traffic was diverted to the Florida East Coast Railway when the road put a line of steamers on from Miami to Nassau, and the increase of this passenger traffic has been small. When the road ran a line of steamers from Miami to Havana it diverted only a small part of the travel which had formerly gone exclusively via Tampa, but, as shown by the testimony of Mr. Parrott (pages ..... of record), this travel was comparatively small; but when the line was completed to Knights Key the travel via the Florida East Coast Railway to Havana became enormously increased,

and this has been further increased since it was completed to Key West, although, when Mr. Parrott testified, the return business from Havana had not yet begun, the months of March and April being the greatest for travel (pages 734-5 of record).

During the entire fiscal year ended June 30, 1911, the Company handled between Knights Key and Havana, both ways, 15,095 passengers; up to January 22, 1912, there had been handled to and from Knights Key and Havana 4,694 passengers. On the 22d of January the line was opened to Key West, and from that time to the end of February 7,612 more passengers had been handled to and from Havana and Key West, or a total of 12,261 passengers, or only 2,834 passengers less than the entire year from Knights Key, and, as stated by Mr. Parrott (pages 734 and 735 of record), March was a better month than February, and up to the middle of April far better than February. We may not be permitted to state what the total traffic of the fiscal year ending June 30, 1912, over the extension to Key West and Havana and return amounted to, as it is not part of the record, but the increased passenger business shown up to the time of testifying and the enormous number of persons carried only one way to Havana conclusively shows the enormous benefits conferred upon the main line by the extension. Every passenger leaving Jacksonville has to pay $11.00 to Miami (see Parrott's testimony, page 752 of record), or something like $13.00 to Homestead.

We submit that the testimony was and is con-

clusive and that the holding of the learned Court below in this respect was erroneous.

Indeed, if we deduct the freight paid by the company itself for material transported for its own use over the balance of the line to the extension (some $98,000), the actual aggregate of freight business was less than $303,000. Deduct the pessenger fares paid by the railroad company for carrying employes over its road to the extension ($9,000) leaves the increase of passenger traffic $310,000, or $8,000 more than the increase of freight, something unusual, if not unprecedented, with a railroad company that transports both freight and passengers, and reducing the percentage of increase of freight to about 15%, while the percentage of increase from passenger fares would remain practically unchanged (nearly 30%). As a matter of fact, of the net earnings of $1,300,000 during the fiscal year ending June 30, 1911, $490,000 was furnished by the extension from Miami, as against $827,000 furnished by the balance of the line from Miami to Jacksonville and its branches.

EIGHTH ASSIGNMENT OF ERROR.

"The Court erred in deciding that the Interstate Commerce Commission had any evidence before it in 1911 to show any material increase in carload shipments or any material saving to the appellant (petitioner) as a result of the reduced rates on carload shipments from points of origin."

It is submitted to the Court that this holding of

the Commerce Court is absolutely without evidence to sustain it. On the contrary, the testimony of Mr. Kirtland shows that so far as the Florida East Coast Railway Company was concerned there had not been any material increase in carload shipments or any material saving to the appellant as a result of the reduced rates on carload shipments from points of origin. Mr. Kirtland testified (pages 422, etc., of record) showing that before the railroad company made the reduction and established carload rates there had been an increase in carload lots resulting from the shippers or growers selling f. o. b. in carload lots and gave the percentage of increase before there was any reduction of rates whatsoever. This increase was during the fiscal year ending June 30, 1910, and there is absolutely no evidence that the reduction of rates effective July 10, 1910, and which was in force when all the orange, pineapple, and vegetable crops were shipped during the fiscal year ending June 30, 1911, ever produced any increase in carload shipments. In many cases, even where a carload was shipped from the point of origin, it contained fruit or vegetables consigned to different persons in different States, and the company had, on arrival in South Jacksonville, to divide this freight and put it in proper and appropriate cars, but we submit there is not one word of evidence to show that there was any saving to the Florida East Coast Railway Company from the reduced carload rate made by it. The only result was the reduction of $81,000 from vegetables alone, the volume being about the same as the previous year. Here, again,

we submit that the Commission acted without evidence, but purely upon a theory and upon speculative opinions without any basis of fact.

It must not be forgotten that for years before the reduction to carload rates the tendency had been for an increase of the percentage of shipments from less than carload to carload rates, and, consequently, it cannot be justly claimed that the present increase was due to less than carload rates. (See Kirtland's testimony, page 456 of record).

NINTH ASSIGNMENT OF ERROR.

"The Court erred in deciding that the rates fixed by the petitioner put any increased burden on the shippers on the line from Jacksonville to Homestead."

In 1908, when the rates were for any quantity and were much higher, the Interstate Commerce Commission held that these higher rates were reasonable. Instead of putting any increase burden on the shippers on the line from Jacksonville to Homestead, in 1910 the appellant relieved these shippers on the line from Jacksonville to Homestead from burden by reducing the rates on all freights about 10%, and by reducing the rates on citrus fruits and vegetables an average of nearly 18%. Where the great mass of the vegetables were produced the reduction was very much greater. As a consequence, the rates fixed by the petitioner, effective July 10, 1910, instead of putting any increased burden on the shippers on the line from Jackson-

ville to Homestead, absolutely relieved them from the burden of rates which in 1908 the Interstate Commerce Commission had solemnly held were reasonable and just, although the condition of the road was not in 1910 or 1911 as good as it was in 1908. While the business had been increased, the necessary expenditures of the road had increased in a larger sum.

TENTH AND ELEVENTH ASSIGNMENTS OF ERROR.

TENTH ASSIGNMENT: "The Court erred in vacating the preliminary injunction and dismissing the petition."

ELEVENTH ASSIGNMENT: "The Court erred in not granting the relief prayed for in the petition."

These two assignments may be argued together. If the Commerce Court erred on any of the assignments herein made, then it certainly erred in vacating the preliminary injunction and dismissing the petition, and it follows, therefore, as a matter of course, that the Court erred in not granting the relief prayed for in the petition.

It is contended by the Appellees that, because the Seaboard Air Line Railway and the Atlantic Coast Line Railroad Company put the rates objected to in operation on their lines of road, that was a reason why the Florida East Coast Railway Company should do the same thing. We submit that this and other Courts have held that what may be a reason-

ably high or low rate on one road may be an unreasonably high or low rate on another.

All that is necessary to do is to refer this Court to the record showing the enormous difference between the business of the Florida East Coast Railway Company as compared with the Seaboard Air Line Railway and the Atlantic Coast Line Railroad Company. Both of these roads do a larger passenger business than the Florida East Coast Railway Company. In the matter of freights the comparison is grotesque:

COMPARISON OF FREIGHTS.

Perishable High-rate Freight	*Whole tons*
Florida East Coast Railway, fruits and vegetables	124,892
Atlantic Coast Line, fruits and vegetables	249,111
Seaboard Air Line, fruits and vegetables	216,120
Dead Freight Produced in Florida	
Florida East Coast, lumber, naval stores and forest products	122,451
Atlantic Coast Line, lumber, naval stores, forest products, phosphate and other mining products and cotton	2,686,624
Seaboard Air Line, lumber, naval stores, forest products, phosphate and other mining products and cotton	1,916,342

The tremendous discrepancy between the roads in this regard is to be seen by the following comparison of freights:

Florida East Coast, produced on line of road	247,343
Atlantic Coast Line, produced on line of	

road.....2,935,735
Seaboard Air Line, produced on line of road 2,132,462

We have excluded the Southern Railway from these comparisons because this road has little or no mileage in the State of Florida. In its most important run it uses the tracks of the Atlantic Coast Line and the Seaboard Air Line to find access into Jacksonville.

The mileage of the Atlantic Coast Line Railroad in Florida is less than four times that of the Florida East Coast Railway, and that of the Seaboard Air Line Railway in Florida is less than three times that of the Florida East Coast, while the Atlantic Coast Line Railroad in Florida handles more than five times the entire tonnage of the Florida East Coast Railway, and the Seaboard Air Line Railway in Florida handles 3 3-4 more than the entire tonnage of the Florida East Coast Railway. The aggregate tonnage of each road on all freights handled in Florida, whether produced on the line of road or not, for the fiscal year ending June 30, 1911, is as follows:

Florida East Coast Railway Company..... 787,658
Seaboard Air Line Railway.....2,830,088
Atlantic Coast Line Railroad Company.....4,087,839

The Florida East Coast Railway carries no phosphate, cotton or kaolin and but little naval stores or forest products or lumber, while the other roads, as shown, carry enormous quantities of this dead freight, the most profitable dead freight a railroad carries.

In conclusion, we submit that the Appellant in this case was entitled to the relief prayed and that the Commerce Court erred in sustaining the action of the Interstate Commerce Commission. By its action and decision it sustains the Commission in practically confiscating the entire line of road from Homestead to Key West; it appropriates every dollar of the earnings secured by the line from Homestead to Jacksonville, which the extension from Homestead to Key West brought to the balance of the main line and appropriates it to the use of the line from Homestead to Jacksonville, giving it to this part of the main line as a gift, and refusing to consider this contribution in the fixing of rates.

We submit: That the extension to Key West did not begin at Homestead, but began at Miami. We further insist that neither the Interstate Commerce Commission nor the Commerce Court possesses the power to ignore one portion of this main line and to arbitrarily fix a terminus which, in the very nature of things, could not possibly be a terminus, and we ask that the decision of the Commerce Court be reversed, with instructions to grant to this Appellant the relief prayed for.

All of which is respectfully submitted.

Alfred Allen Adams

Fred C. Bryan

Attorneys and Solicitors for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 858

FLORIDA EAST COAST RAILWAY COMPANY, Appellant,
vs.
THE UNITED STATES, Respondent;
Interstate Commerce Commission, *et al.*, Interveners, Appellees.

On Appeal from the Commerce Court.

BRIEF AND ARGUMENT

for

THE RAILROAD COMMISSIONERS OF FLORIDA.

The first nine assignments of error relied on by appellant attack the reasoning on which the judgment below is based, rather than the judgment itself. They may therefore be taken as subsidiary to the last two assignments, which go to the final judgment of the Court.

The last two assignments are:

TENTH ASSIGNMENT: "The Court erred in vacating the preliminary injunction and dismissing the petition."

ELEVENTH ASSIGNMENT: "The Court erred in not granting the relief prayed for in the petition."

It is the purpose of this brief, not to argue the various assignments, severally, but to attack only certain fundamental fallacies which underlie petitioner's theory of the case.

I.

IN THIS CASE ADEQUACY OF RETURN UPON THE FAIR VALUE OF PETITIONER'S PROPERTY IS NOT THE TEST OF REASONABLENESS.

A view of the petition makes it apparent that this case rests on the theory that the validity of the order in question is to be tested by the rule of Smyth v. Ames, that adequacy of return upon the fair value of the property being used by the carrier is the controlling factor.

The contentions of petitioner on this point are fairly summarized in the following language from the petition:

> "That your petitioner has not yet earned and is not now earning a reasonable profit on the money actually invested in its said road or on its present value; that your petitioner is entitled to earn at least 8 per cent. on the present value of its property, but that your petitioner has been contented to await for an enlargement and extension of business that would enable it to earn such reasonable profit and to pay reasonable dividends on its capital stock. And your petitioner respectfully represents that it is unreasonable to fix rates on freights at figures that will not enable your petitioner to pay the interest charges on its first mortgage bonds and on its general mortgage income bonds." Record, 8 – 9.

It is submitted that petitioner has proceeded on an erroneous theory.

The rule of Smyth v. Ames is not applicable because:

(a) The order in question in this case does not involve a general scheme of rates, "where rates as a whole are under consideration."

The rule of Smyth v. Ames is by the language of the Court clearly limited to those cases in which "a court without assuming itself to prescribe rates, is required to determine whether the rates prescribed * * * * for a corporation * * * * **are, as an entirety**, so unjust as to destroy the value of its property," etc.

169 U. S. 466, Smyth v. Ames.

The proper scope of the rule was defined by this Court in:

206 U. S. 1, A. C. L. Rd. Co. v. N. C. Corp. Com.

(Page 24) "Conclusive support for this contention, it is insisted, is afforded by the doctrine upheld in Smyth v. Ames * * * and the cases which preceded that decision. The cases relied upon, however, only involved whether a **general scheme of maximum rates** imposed by state authority prevented the railroads from earning a reasonable compensation," etc.

(b) The order in question in this case, as appears by its terms, does involve rates on specific articles, and thus the case is brought within the rule of the Union Pacific case.

222 U. S. 541, Interstate Commerce Commission v. Union Pac. Rd. Co.

(Page 549) "Where the rates as a whole are under consideration, there is a possibility of deciding with more or less certainty whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carriers total income enables it to declare a dividend that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. But the absence of direct testimony that the 50 cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40 cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the service worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such

method of proof. The matter has to be determined by a consideration of many facts."

Since the petition herein, in effect, prays the application of the rule of Smyth v. Ames in a case involving the reasonableness of rates on particular articles, it is manifest that the relief can not be granted.

II.

COST OF SERVICE WOULD HAVE PROVED A SOUNDER BASIS OF CALCULATION IN THIS CASE.

It follows that the order now under attack must be tested by some standard other than the rule of Smyth v. Ames. That standard is apparently found in the expressions of this Court and inferior Courts as to

COST OF SERVICE.

The following cases are pertinent:

186 U. S. 257, M. & St. L. Rd. Co. v. Minnesota.

(Page 266) "The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots * * *. True it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand the commission in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low."

176 U. S. 167 Chicago, M. & St. P. Rd. Co. v. Tompkins.

"We think, therefore, there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascer-

taining thus the net earnings, can the true effect of the reduction of rates be determined."

35 Fed Rep. 883, Chicago &c. R. Co. v. Becker.

(Page 886) "It is not within the power of the State, directly or indirectly, to put in force a schedule of rates, when the rates prescribed therein will not pay the cost of service."

35 Fed 866, Chicago &c. R. Co. v. Dey.

(Page 879) "Compensation implies three things: Payment of cost of service, interest on bonds and then some dividend. Cost of service implies skilled labor, the best appliances, keeping of the roadbed and the cars and machinery and other appliances in perfect order and repair."

203 U. S. 256, A. C. L. Rd. Co. v. State of Florida.

(Page 260) "There is testimony tending to show the gross income from all local freights and the value of the railroad property, and also certain difficulties in the way of transportng phosphates, owing to the lack of facilities at the terminals. But there is nothing from which we can determine the cost of such transportation. We are aware of the difficulty which attends proof of the cost of transporting a single article, and, in order to determine the reasonableness of a rate prescribed, it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or in what cases the inquiry must be special and limited. It is enough for the present to hold that there is in the record nothng from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the Commission will have upon the income. Under these circumstances it is impossible to hold that there was error in the conclusions reached by the Supreme Court of the State of Florida, and its judgment is affirmed.

164 Fed. Rep. 645, M. K. & T. Co. v. I. C. C.

(Page 648) "To be just and reasonable, within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rate must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public. And where the cost to the carrier is not kept within reasonable limits, or where for any reason its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier, as would be the case if it were engaged in any other line of business."

The importance of the cost of service, as a factor in determining the reasonableness of rates, has never been denied; but it has often been neglected, because of the difficulty in ascertaining such cost.

On this point however it has been said by this Court in the Minnesota case, supra, that the Commission "ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low."

The neglect of this factor, however, has been more apparent than real.

Does not this factor in reality underlie the conclusion in every case involving the reasonableness of rates?

It is quite certain that this factor does underlie the rule of Smyth v. Ames. That rule reduced to its final analysis apparently rests upon this basis:

The fundamental principle is that a carrier is entitled, under normal conditions, to be paid, for the service it performs, an amount sufficient to cover the cost of that service and a reasonable profit.

Logically, then the first step is to determine the cost of the service, if it can be ascertained. This first step is often very difficult; but there is one class of cases, represented by Smyth v. Ames, where the step is so easy that we often fail to realize that it is a part of the process.

In cases of this class, "where the carrier's rates as a **whole** are under consideration," it is manifest that the service rendered to earn those "rates as a whole" is the **entire service** performed as a common carrier; and it is equally manifest that the total cost of that service is identical with the carrier's total operating expenses, while the difference between operating revenues and operating expenses is the carrier's profit on its investment.

Then the final step in the process is to determine whether that profit is reasonable; and Smyth v. Ames, taking the process for granted, stating the result but not the method, institutes a comparison between the ascertained profit derived from the entire service and the total investment employed in that service and thus reaches an accurate result as to the reasonableness of that profit.

Clearly, it is impossible that this same comparison should give any result as to the profit derived from a particular service or as to the reasonableness thereof.

The decisions of this Court, cited supra, make inevitable the conclusion that, in cases involving the reasonableness of rates on particular articles, the **cost of service** is an essential factor. The petition herein has ignored that theory of the case. Hence the relief sought was properly refused by the Court below.

It might be said that the evidence is not lacking in data as to the cost of service. This is true, and, though the pleadings do not justify the consideration of such evidence, though such consideration involves a complete departure from petitioner's theory of the case, it may not be amiss to exami that evidence far enough to determine what its tendency is.

It is the testimony of a witness for petitioner that its rates are based on the assumption that the average cost per ton per mile for hauling freight is 5 mills (Record 462); but it may be said that the cost of hauling fruits and vegetables runs higher than the average cost.

There is evidence to this effect, but no attempt was made to show what this difference amounts to. However, there is evidence that may be profitably considered in this connection.

It is shown (Record 538) that on pineapples from Key West to Jacksonville when destined to Cleveland the peti-

tioner receives 16 cents per box of 80 lbs., which amounts to 9 mills per ton per mile.

As to this business a witness for petitioner says (Record 471) "we don't feel that we are losing anything on the Cuban business."

Hence we must conclude that the cost of service on pineapples lies somewhere between 5 mills per ton per mile and 9 mills per ton per mile; and in the absence of other evidence there is no reason apparent for a greater cost in handling oranges and vegetables.

Having approximated the cost of this particular service, how is the profit to be ascertained?

It is in evidence (Record 904) that petitioner's operating expenses and operating revenues stand in the relation of 62.24 to 100; that is to say, $62.24 expended for cost of service (operating expenses) produces a return of $100.00 (operating revenues).

This being true, what proportionate return will result from 9 mills per ton per mile expended for cost of a particular service?

It is a simple problem in proportion. If the petitioner be allowed the benefit of the doubt, by placing the cost of service on fruits and vegetables at 9 mills per ton per mile, the problem is:

62.24 : 100 :: 9 : X

Worked out, the result is

X=13.8 mills.

The conclusion then is that if the carrier is to earn the same profit above cost of service on this business as on its business taken as a whole, the income from fruits and vegetables ought to be—

Per ton per mile.....13.8 mills.

But the evidence is that under the rates now in controversy the carrier will earn per ton per mile—

On vegetables ..... 22.02 mills
On citrus fruits ..... 21.16 mills

(Record 847)

851

Thus there is for the carrier a margin of safety amounting to over 8 mills per ton per mile in the one case and more than 7 mills in the other.

This brings petitioner to the two horns of a dilemma.

(1) If it be said that the evidence as to cost of service is not sufficient to justify a conclusion on that point, the petitioner must fail, because:

The burden rests upon petitioner to overcome the presumption of reasonableness which follows the Commission's order; and, under the doctrine of the Minnesota case, supra, cost of service is an essential factor in determining as to the reasonableness of rates in cases of this class. Then, for its failure to establish the cost of service, the penalty must fall upon petitioner's own head.

(2) If it be said that the cost of service has been shown by the evidence, the answer is that the same evidence shows the profits earned by that particular service to be materially in excess of the percentage of profits heretofore earned by petitioner on its business taken as a whole, which fact makes it clear that there has been an inequality in rates; and thus the case is brought clearly within the rule of

> 203 U. S. 261, Seaboard Air Line Railway v. State of Florida.
>
> (Page 269) "Now, whether this order of June 25, 1903, was simply operative to make the rates on the Florida West Shore road the same as those obtaining generally in the State, or whether it made them higher or lower than such rates, does not appear * * * * * The State might properly insist that there should be equality in the rates—the conditions being the same—and if nothing more was accomplished by the order of the Commission than to establish such equality, we can not hold that the judgment of the Supreme Court was erroneous."

III.

AVERAGE FREIGHT RECEIPTS AS A TEST.

A comparison of the carrier's average freight receipts

per ton per mile with the rate per ton per mile fixed by a contested order was recognized by this Court as a satisfactory test of reasonableness in one of the Florida Phosphate cases, cited supra, where the Court said:

> 203 U. S. 261, S. A. L. Ry. v. Florida:
>
> (Page 270) "Further, when we turn to the report of the railroad company (which, of course, is evidence against it), we find that the company's average freight receipt per ton per mile in the State of Florida was 8.15 mills; so that the rate authorized for phosphates was nearly 2 mills per ton larger than such average. Under these circumstances it is impossible to say that there was error in the conclusions of the Supreme Court of the State, and its judgments are affirmed."

This is another available test which petitioner has failed to use, having apparently ignored this theory of the case. There is, however, evidence sufficient to make it plain that under this test petitioner would not be entitled to relief.

If we allow to petitioner the most that can be claimed for it,

The average of freight receipts per ton per mile is (Record ——) ..456..8.61 ..... 17.7 mills
while the contested rates will yield the carrier—
On vegetables (Record 342) ..... 22.02 mills
On citrus fruits (Record 351) ..... 21.16 mills
leaving a margin of more than ..... 4 mills
in the one case and in the other more than .... 3 mills

Since the Supreme Court has held a margin of less than two mills to be safe, surely margins of three and four mills in this case must be safe.

IV.

THERE IS NO SEPARATION OR APPORTIONMENT OF INTERSTATE AND INTRASTATE BUSINESS.

Because there is no separation or apportionment of inter-

state and intrastate business, petitioner was not entitled to the relief sought, even if the rule of Smyth v. Ames could be held applicable, for it is a part of that rule that interstate and intrastate business must be kept separate.

169 U. S. 466, Smyth v. Ames.

(Page 541) "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. This State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business, a similar one may be in Illinois, Minnesota, and other States through which the company's road should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic busi ness."

This decision was foreshadowed in the opinion of Mr. Justice Brewer, then Circuit Judge, in the Dey Case.

35 Fed. Rep. 866, Chicago &c R. Co. v. Dey.

(Page 881) "But the invalidity of this schedule does not depend upon legislation or action elsewhere. If this schedule may be put in force here,

runs. For some purposes its property in this State is separate and distinct from its property elsewhere, and out of this property within this State it is entitled to receive some compensation. Robbing Peter to pay Paul has never received judicial sanction."

The doctrine has been applied by many courts. It is well stated in—

170 Fed Rep. 725, So. Pac. Co. v. Bartine.

(Pages 769-770) "The facts in relation to the business of the company for the fiscal year ending June 30, 1907, are introduced to demonstrate the injustice of the maximum rates, not as applied to the whole business, nor as applied to the whole intrastate business, but only as applied to domestic freight traffic. No evidence so introduced shows the amount of domestic freight handled, the average distance it was hauled, the rates charged, the total compensation, or the operating expenses incurred in moving it. If we know neither the service performed, the compensation received, nor the expense incurred, how can we determine whether lower rates and charges for transportation are reasonable or unreasonable? If the net income from domestic freight traffic is relatively large, that branch of the business may be profitable, though the business as a whole is very unprofitable. The facts are not given from which we may determine whether the charges are higher or lower, or whether the operating expenses are greater or less for intrastate freight than for other business of the company. State v. Atlantic Coast Line R. R. Co., 48 Fla. 146, 37 South. 657.

The testimony here is wholly insufficient to overcome the presumption in favor of the constitutionality of the act, and the reasonableness of the maximum rates therein set forth."

Other cases discussing the matter in greater detail are:

91 Fed. 47, No. Pac. Ry. Co. v. Keyes.
(Pages 48-9.)

48 Fla. 129 (37 So. Rep. 314), State v. S. A. L. Ry.
(Pages 144-5.)

48 Fla. 146 (37 So. 657) State v. A. C. L. R. Co.
(Pages 148-9.)

"While a State is not permitted to offset local business against interstate business and to justify low local rates by reason of the profitableness of the latter, yet the interstate and foreign business may and should be considered in determining the proportion of the value of the property of the company assignable to local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business. There is no proper showing of the interstate and foreign business, so that we may determine on what fraction of the whole value of the property in Florida the company might be entitled to earn an income from local business. There is, however, a showing that the interstate and foreign business is large, and on a proper showing and a proper proportioning of the service between domestic and foreign business this percentage of net income would be largely increased."

163 Fed. Rep. 141, In re Arkansas R. Rates.

184 Fed. Rep. 765, Shepard v. No. Pac. Ry. Co., where the rule is clearly recognized.

185 Fed. Rep. 321, Love v. A. T. & S. F. Ry. Co.

187 Fed. Rep. 290, In re Arkansas Rate Cases.
(Page 310) "The matter of most importance to be determined is whether the rates, freight and passenger, in force at the time of the institution of these actions by order of the State Railroad Com-

mission and the Legislature of the State, were so unreasonably low as to justify the Court to enjoin their enforcement, upon the ground that they are noncompensatory to an extent which makes them practically confiscatory of complainants' property. To determine that question it is necessary for the Court to ascertain and make findings what the investment of each road is; what its gross earnings from the intrastate traffic, freight and passenger, are; what the expenditures necessary for the proper management of the roads are; **how to apportion the investment and expenditures between the intra and interstate business;** what the net earnings from all the intrastate traffic are; and what would be a reasonable return on the investment."

It follows that, even if petitioner's theory of the case could be accepted, petitioner has fallen short in failing to establish this essential factor.

V.

AS TO DISREGARDING THE VALUE OF THE KEY WEST EXTENSION.

If this case were properly governed by Smyth v. Ames, there is still a fatal defect in petitioner's processes in this:

That petitioner's case apparently rests on the theory that the rates must necessarily be such as to render its business profitable; that the public must guarantee the railroads a certain income on their investment, regardless of the condition of the country traversed, or whether bad judgment was exercised in the selection of the route. Record 12

The view of the Court below is to the contrary.

This is no new doctrine.

This Court and lesser tribunals, before the Commerce Court, have recognized the rule, though they have not been called on to make exactly the same application that was made by the Court below.

154 U. S. 362, Reagan v. F. L. & T. Co.

(Page 412) "It is unnecessary to decide, and we do not wish to be understood as laying down

as an absolute rule, that in every case a failure to produce some profit * * * * * is conclusive that the tariff is unjust and unreasonable * * * * There may be circumstances which would justify such a tariff. There may have been extravagance, and a needless expenditure of money. * * * * * * The road may have been unwisely built in localities where there is no sufficient business to sustain a road.'

189 U. S. 439, San Diego Land and Town Co. v. Jasper.

(Pages 446-7) "If a plant is built, as this probably was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return. The only ground for such a claim is the statute taken strictly according to its letter. * The statute of California no doubt was contemplating the case of water-works fully occupied within the area which they intended to supply. It hardly can have meant that a system constructed for six thousand acres should have a full return upon its value from five hundred, if those were all that it supplied. At all events, we will not be the first to say so. If necessary to avoid that result, we should assume that only a proportionate part of the system was actually used and useful within the meaning of the statute."

To the same effect are—

164 U. S. 578, Covington v. Sanford.

169 U. S. 466, Smyth v. Ames.

That the Commerce Court are not alone in their construction of the language of this Court is apparent from the view expressed in the following cases:

164 Fed. Rep. 645, M. K. & T. R. Co. v. Interstate Com. Com.

(Page 648) "And where the cost to the carrier is not kept within reasonable limits, or where for any reason its business can not reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier, as would be the case if it were engaged in any other line of business."

168 Fed. Rep. 720, In re Arkansas Railroad Rates.

(Page 733) "Must the public guarantee the railroads a certain income on their investment, regardless of the condition of the country traversed, or whether bad judgment was exercised in the selection of the route? We do not think so. New lines or branches to increase the business of the main line, or the exercise of bad judgment in the building of a railroad, are matters to be considered in determining what rates would be fair and just to the corporation as well as the public."

170 Fed. Rep. 725, So. Pac. 60 v. Bartine.

(Page 767) "If a railroad is built into a new, sparsely settled territory with a view of serving a large future population and developing business, the Constitution does not require the few people and the small business of the present time to pay rates which will yield an income equal to the full return to be gathered when the country is populated and business developed to the full capacity of the road."

177 Fed. Rep. 493, M. K. & T. R. Co. v. Love.

(Page 501) "Rates should be just both to the public and to the owner of the railroad * * * * It does not appear in these cases that the roads were ill conceived, greater in extent than they should be, unduly expensive in construction, or that they are not operated wisely and economically. It, therefore, does not seem that rates producing no more than a reasonable return on their fair value could be unjust to any one."

In the San Diego case, quoted supra, this court, after sustaining a low rate of return upon the company's investment, announces that it would have been proper, as sustaining the view of the court, "to assume that only a proportional part of the system was actually used and useful within the meaning of the statute."

So the Interstate Commerce Commission in this case, and the Court below, might have held a low rate of return to be ample compensation to the petitioner in view of the character of petitioner's investment, or it was proper "to assume that only a proportional part of the system was actually used and useful."

The foregoing authorities are sufficient to sustain either course, and clearly the court below was justified in sustaining the action of the Commission in this respect.

CONCLUSION.

I. This case is not controlled by the rule of Smyth v. Ames. It is not a case in which the value of the property is the proper basis of calculation as a test of reasonableness. Therefore, petitioner's theory of the case is wholly erroneous.

II. The cost of the service rendered would have been a sounder basis of calculation in this case, and petitioner has not met that requirement.

III. Petitioner might have used the average freight receipts as a test, but has not met that requirement.

IV. Even if this case were controlled by the rule of Smyth v. Ames, the petitioner is not within the terms of that rule because there is no separation or apportionment of interstate and intrastate business.

V. Even if this case were controlled by the rule of Smyth v. Ames the petitioner is not within the terms of that rule because petitioner's theory of the case assumes that the carrier is entitled to a profit on its investment regardless of qualifying circumstances.

It is submitted that the foregoing five propositions are sustained, and that if any one of those propositions is well founded, the petitioner was not entitled to the relief prayed; and that, therefore, the judgment of the court below ought to be affirmed.

Respectfully submitted,

FREDERICK M. HUDSON,
Attorney for the Railroad Commissioners of Florida.

No. 883.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

FLORIDA EAST COAST RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION ET AL., INTERVENING RESPONDENTS,
Appellees.

APPEAL FROM THE COMMERCE COURT.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

CHARLES W. NEEDHAM,
Assistant Solicitor for the Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1913

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CASES CITED.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*,

v.

THE UNITED STATES, RESPONDENT; INTERSTATE COMMERCE COMMISSION ET AL., INTERVENING RESPONDENTS, *Appellees*.

No. 858.

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This case involves an order of the Interstate Commerce Commission, entered on the 6th day of November, 1911, declaring unreasonable the existing rates, and establishing, for the future, reasonable mileage rates on fruits and vegetables from producing points to the base point in Florida, when destined for points beyond in other States, over the Seaboard Air Line Railway, the Atlantic Coast Line Railroad, and the appellant, Florida East Coast Railway. The first two named carriers have complied with, and do not question, the order.

The complainants before the commission were, the Railroad Commission of the State of Florida and the Florida Fruit and Vegetable Shippers' Association of Florida. These complainants, acting on behalf of the fruit and vegetable growers of the State, sought to secure reasonable rates, upon a mileage basis, from all parts of the State to Jacksonville, the base point, to be applied to interstate shipments.

The Florida State Railroad Commission is required by statute (sec. 2898, Chap. 5, Gen. Stat. of Fla.)—

> * * * to investigate thoroughly all through freight rates from points out of Florida to points in Florida, both those now fixed and those that may hereafter be fixed. Whenever said railroad commission finds that a through rate charged into or out of Florida is, in their opinion, excessive or unreasonable or discriminating in its nature, it shall be the duty of said commission to call the attention of the railroad officials in Florida to the fact and to urge upon them the propriety of changing such rate or rates. Whenever such are not changed according to the suggestions of the railroad commissioners, it shall be the duty of the commission to present the facts, whenever it can be done, to the Interstate Commerce Commission and appeal to it for relief.

The act of Congress to regulate commerce provides that—

> Said [Interstate Commerce] Commission shall, in like manner, and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or

> railroad commission of any State or Territory at the request of such commissioner or commission. (Sec. 13.)

In the report of the Interstate Commerce Commission in this case it is stated:

> Numerous complaints were made to the Railroad Commission of Florida that these fruit and vegetable rates up to the base point were excessive, and the commission, for the purpose of informing itself, held investigations in all parts of the State where these defendants operate. (Record, p. 22.)

Failing to secure relief from the carriers, and with a view to securing reasonable rates and, so far as possible, a uniform scale of mileage rates to Jacksonville from every part of the State, the Railroad Commission of Florida, on January 28, 1911, filed its complaint with the Interstate Commerce Commission against the Seaboard Air Line Railway and the Atlantic Coast Line Railroad. This case is known as No. 3808 on the commission's docket. The railroad commission also intervened in case No. 1168, in which the appellant was a party defendant. (Record, pp. 21, 22.) In these two cases all the gathering charges on fruits and vegetables within the State of Florida—except the rates on pineapples then in force upon the Florida East Coast Railway—were under attack by the railroad commission of that State.

In order to distinguish the case under consideration from others that preceded it, it should be borne in mind that case, No. 1168, was origi-

nally commenced in 1908 and involved the reasonableness of the rates from points of production in Florida to points of destination in other States. The rates then under consideration were divided into two parts: (1) The gathering rates from points of production to the base points—principally Jacksonville—and (2) from the base point to points of final destination in the United States east of the Rocky Mountains; the sum of these rates constituting the through charge. The commission held that the rates from the base points to points of destination were unreasonable, and fixed reasonable rates, but approved, upon the evidence at that hearing, the reasonableness of the gathering rates. This case was decided June 25, 1908, and is reported. (*Florida Fruit & Vegetable Shippers' Protective Association* v. *A. C. L. R. R. Co.*, 14 I. C. C. Rep. 476.)

In a supplemental proceeding instituted by pineapple growers located upon the line of the appellant, the gathering rates on pineapples and citrus fruits were the subject of investigation. The result of that hearing, and a subsequent modification of the order excepting citrus fruits, required appellant to put in carload and less-than-carload rates and distance rates on pineapples on the appellant's line. The appellant complied with the order and put the rates in force. This case was decided February 8, 1910. (*Florida Fruit & Vegetable Shippers' Protective Association* v. *A. C. L. R. R. Co.*, 17 I. C. C. Rep. 552.)

The orders in both of the cases referred to were complied with and neither the orders, or the procedure in either case, are in controversy in this case.

THE CASE IN CONTROVERSY.

The case before the commission in which the order in question was entered was, as above noted, instituted by the Florida State Commission by an original complaint and an intervention in case No. 1168. These complaints were set for hearing, as one case, before Commissioner Prouty, at Jacksonville, Fla., March 2, 1911. The three defendant carriers, including the appellant, appeared at the hearing. The issue was clearly stated by the commissioner as follows:

> Gentlemen, we are here once more to take up the fruit and vegetable question, this time from the point of production up to the base point. * * * I think these two proceedings put in issue rates generally on vegetables and citrus fruits from points of production in Florida up to the base points. * * * Who appears for the Florida East Coast Railway Co.?
>
> Mr. ST. CLAIR-ABRAMS. I do.
>
> (Record, p. 1511.)

As stated by the commission in its report of this case (Record, p. 21):

> It will be seen, therefore, that in these two proceedings all the gathering rates in the entire State of Florida, except the rates on pineapples now in force on the Florida East Coast Railway, are under attack and that

these proceedings are instituted by or have the support of the railroad commission of that State.

A large amount of evidence was taken in this last hearing, with elaborate statements by counsel. (Record, pp. 1511 to 1620, inclusive.) It was also agreed that, so far as applicable, the evidence taken in the two preceding hearings should be considered by the commission in the pending case. A certified copy of the evidence in the two preceding cases, as well as a certified copy of the evidence taken in the pending case, was before the Commerce Court. In diminution of the record upon this appeal, a stipulation between the appellant and appellees was made (Record, p. 1649) eliminating certain documents, including the certified copies of the evidence taken in the first two cases, and these documents and records are not included in the record here. In lieu thereof it was stipulated that the statement of the issues and facts in the first two cases is contained in the commission's reports, and said reports may be referred to on the hearing of this appeal as containing a correct statement of the issues and facts in those cases. It follows, therefore, that objections to procedure can only be taken to action in the pending case, commenced January 28, 1911, and objections to the order, on the ground that the order is arbitrary, must be determined with reference to the record of the evidence taken in the last case and the statement of facts contained in the commission's reports of the first two cases. There are many exhibits still in

the record—letters, affidavits, etc.—bearing date prior to January 28, 1911, which have no relevancy to the issues herein.

THE ISSUES.

In the Procter & Gamble case this court, speaking through the Chief Justice, held that—

> The courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so.

The issues herein therefore are:

1. Does the order in question violate the provisions of the Constitution of the United States (*a*) guaranteeing due process of law, and (*b*) requiring that just compensation be paid for property taken for public use?

2. Did the commission, in the proceeding in which the order was entered, conform to statutory authority?

3. Did the commission, in making the order in question, exercise its power so arbitrarily as virtually to transcend the authority conferred by the statute?

To confine the argument within the limits of judicial inquiry defined by this court, the issues raised by the assignments of error are discussed herein under the general heads above stated.

I.

Does the order in question violate the provisions of the Constitution of the United States (a) guaranteeing due process of law and (b) requiring that just compensation be paid for property taken for public use?

DUE PROCESS OF LAW.

Due process of law is not limited to judicial procedure; it includes measures and procedure of a summary nature. It requires that there shall be a tribunal authorized by law to determine the matter, and all parties interested in the determination must have notice and an adequate opportunity to be heard.

Den v. *Hoboken Land Co. etc.*, 18 How. (U. S.), 272.
Twining v. *New Jersey*, 211 U. S. 78.
Reeves v. *Ainsworth*, 219 U. S. 296.
U. S. v. *Grimaud*, 220 U. S. 506.
Blinn, Receiver, etc., v. *Nelson*, 222 U. S. 1.
U. S. v. *B. & O. S. W. R. R.*, 222 U. S. 8.
Standard Oil Co. v. *Mo.*, 224 U. S. 270.
Jordan v. *Mass.*, 225 U. S. 167.

The sole issue, in the case at bar, before the commission was the reasonableness of the gathering rates upon fruits and vegetables from points of production in Florida to the base points, applied to interstate traffic. The issue was clearly stated at the opening of the investigation by Commissioner Prouty. The commission is the primary tribunal, authorized by the statute, to determine such issues; section 15 of the act to regulate commerce, as amended, and

construed by this court, confers upon the Interstate Commerce Commission the power to determine the reasonableness of rates for the future; and in reviewing the orders of the commission only questions of law and arbitrary action are to be considered. Upon the questions of fact the decisions of the commission are conclusive.

Procter & Gamble v. *U. S.*, 225 U. S. 282, 297.

I. C. C. v. *U. P. R. R. Co.*, 222 U. S. 541, 547.

I. C. C. v. *Ill. Cent. R. R.*, 215 U. S. 452.

This disposes of the first assignment of error as to power.

The claim made by the appellant, that the commission declined to admit proper evidence offered by appellant, is based upon a reply by Commissioner Prouty to a question by Mr. St. Clair-Abrams. The question and answer follow a discussion about the cost of the appellant's railroad. The question and answer are found upon page 1565 of the record, and are as follows:

> Mr. ST. CLAIR-ABRAMS. * * * Now, I insist, if this question is to be opened up entirely, and these radical reductions are to be made, we should be afforded an opportunity of showing what the present value of our property is.
>
> Commissioner PROUTY. I do not think, Mr. St. Clair-Abrams, that we shall make reductions or decline to make the reductions from the revenue standpoint. I do not quite see

> how you can construct your rates on that basis, or how we can approve or disapprove of your rates on that basis.

The commissioner had reference here to the theory that no reduction of particular rates could be made if such reduction would operate to reduce the net revenues of the company so that a given return could not be earned upon the present value of the entire railroad; or, that single rates, or rates upon a particular traffic, are to be determined by reference to the net revenues from the entire system of rates in force upon the road. While recognizing that the general financial condition of a railroad company, as shown by its financial reports to the commission, is always a proper subject of consideration in fixing rates, Mr. Prouty said (Record, p. 1514):

> I do not believe we can take the capitalization of one of these railroads to-day and make that the basis of these vegetable rates. I do not think we can do that. But we ought to try and fix what is a reasonable rate.

This theory, and what constitutes a reasonable rate, is discussed hereafter under the head of "confiscation."

In reference to the point here made that proper evidence was excluded, we claim that in ascertaining the reasonableness of a single rate, or rates upon a particular traffic, it is not the duty of the commission nor is it within the province of the court to enter upon a valuation of an entire railroad system. This would largely defeat regulation.

A fair opportunity was given to the appellant to submit any testimony bearing upon the reasonableness of the rates under consideration. Commissioner Prouty stated (Record, p. 1515):

> We would like to hear any testimony you want to introduce. I simply suggest to you that if we are going to reexamine that question it should be done now in a sufficiently comprehensive and exhaustive manner, so that whatever conclusion is reached will stand for the next dozen years unless some unusual thing happens. The railroads ought to know what to depend upon and the shippers ought to know what to depend upon, and this market ought to know what to depend upon, and this point of production ought to know what to depend upon as compared with other localities of production. We will hear, of course, any testimony you desire to introduce.

Aside from the mere statement of appellant's counsel that—

> "We should be afforded an opportunity of showing what the present value of our property is."

and the reply of Commissioner Prouty that he did not think these rates could be determined "from the revenue standpoint," there is no claim that any evidence offered or suggested by counsel was excluded. This ruling, if it can be called a ruling, can not, for the reasons hereinafter stated, be regarded as error.

The conclusions of the commission were arrived at, and its order was entered, upon substantial evidence regarding the particular traffic under consideration, the service rendered, and the reasonableness of the rates applicable thereto. Due process of law was therefore observed in the entry of the order in question.

CONFISCATION.

The word "confiscation" has been used in judicial decisions in reference (1) to orders requiring a company to perform a particular transportation service for less than the cost of the service with some profit, and (2) to a system or tariff of rates which does not permit the company to earn a reasonable return upon the value of its transportation property.

CONFISCATION AS APPLIED TO A SINGLE RATE.

There can be no claim in this case that the rates prescribed do not give to the carrier a large profit above the cost of the service.

Mr. Kirtland, the traffic manager of the Florida East Coast Railway, gave some statistics regarding the cost of transportation. (Record, p. 463.) He said:

> We must not go below a certain figure because it would be at a loss.
>
> "Q. How do you arrive at that minimum?
>
> "A. Well, it is the old stereotype that everybody uses, at half a cent a ton a mile."

In reference to the rates fixed by the commission, he stated that on citrus fruits from Miami to Jackson-

ville, the longest haul and the lowest rate per mile, the rate would be 1.7 cents, or 17 mills per ton per mile. (Record, p. 456.) Accepting these figures as a perfectly safe basis of calculation, this shows that the lowest rates fixed by the order gave a profit, over the cost of transportation, of 12 mills per ton per mile.

This witness also stated the income per car from Miami to Jacksonville, under the rates fixed by the commission, at $78; twelve-seventeenths of this would show a net profit of $54 per car. The gross rate on coal, fertilizers, etc., for the same distance was $36 per car. They carried the Cuban pineapples on a rate of 66½ cents from Key West to Chicago, the appellant receiving only a portion of this rate for its haul to Jacksonville—he said that there was a profit on the Cuban business. (Record, pp. 261, 262.)

Confiscation can not, therefore, be claimed on the ground that the rates prescribed do not allow the appellant a handsome profit above the cost of service.

CONFISCATION CAN NOT BE PREDICATED OF A REDUCTION OF TOTAL REVENUE OF THE CARRIER CAUSED BY AN ORDER OF THE COMMISSION REDUCING A SINGLE RATE OR RATES UPON A PARTICULAR TRAFFIC.

The third, fourth, fifth, seventh, ninth, and eleventh assignments of error find their basis in the claim that the reduction of these rates, when computed on the volume of the traffic for the preceding year, would decrease the gross revenues, and in that way the net revenues, about $131,000 per annum;

and it is claimed that this reduction in gross revenues would render it impossible for the appellant to earn a fair return upon the value of its entire property. Appellant therefore claimed the right to have its entire property valued by the court and this theory applied.

Congress has not yet appropriated money for, nor has it authorized the commission to make, a valuation of railroad properties. To make a proper valuation the commission would have to establish an engineering department and employ competent engineers and experts. Until such appropriation is made and such a force has been organized, it is impossible for the commission, as respondent in these cases, to properly defend a petition based upon such a theory as is here proposed. While this can not of itself deprive the court of jurisdiction, if such a proceeding is authorized by law, we present the fact to show the gravity and importance of the question involved.

The act to regulate commerce authorizes the commission to determine the reasonableness or unreasonableness of "any individual or joint rates or charges." Rates are therefore treated singly or with reference to a particular traffic. Congress has not, nor has the Interstate Commerce Commission established a system of rates for any company. The tariff of the appellant has never been examined to ascertain whether its rates upon other traffic are fair to the public. There is no evidence, and we claim there is no presumption that the rates, other than those

herein established, are reasonable. It is only in cases where a system of rates *prescribed by law* is under consideration that there is a presumption that all the rates in the tariff are reasonable and just to the public. In the *Arkansas Rate Case* (187 Fed. Rep. 290, 294) Trieber, district judge, speaking of a system of rates established by law, said:

> Presumptively, rates established by authority are reasonable and just, and the burden of proof to show the contrary is upon the party attacking them.

No such presumption can be indulged in favor of a tariff of rates fixed by the carrier. To say that an unreasonable rate, or unreasonable rates upon a particular traffic, can not be reduced if the effect upon the gross revenues will be to reduce the earnings below what would be a fair return upon the value of the entire property, upon the assumption that all the rates in the schedule were reasonable, would absolutely prevent, in most cases, the commission from carrying out the provisions of the statute, by granting relief against unreasonable rates and charges.

In the cases where the railroad property of the carrier has been valued, it was done with a view of determining whether a schedule of rates *in its entirety* was confiscatory. In the case at bar such an inquiry involves the question whether all rates in the schedules are reasonable. This carrier may be carrying certain traffic at less than cost; it may be carrying very much traffic below what is a reasonable profit, and making

up these losses by charging unreasonable high rates upon fruits and vegetables. Surely in such cases it would defeat the statute to say that these unreasonable rates upon fruits and vegetables could not be reduced because of the effect upon the gross receipts.

In the State cases systems of rates applicable to intrastate traffic have been established by or under the authority of the State legislatures. These tariffs came before the court upon two contentions, (1) that the system of rates was confiscatory, and (2) that the system of rates prescribed for intrastate commerce constitutes an unreasonable burden upon interstate commerce. In these cases the single rates included in a particular tariff were not considered; having been fixed by law they were presumed to be reasonable; the issues were determined upon a consideration of the effect of the tariff *as an entirety.* Treated as a whole, as a system of rates established by law, inquiry was directed to the reasonableness of the tariff in producing a return upon the value of the entire transportation property put to the use of the public. In these cases a valuation of the railroad property was properly made. The presumption in such cases is that all the individual rates established by law are reasonable, and if the tariff as a whole, measured by existing traffic, produces sufficient revenue to constitute a fair return upon the value of the property it is not confiscatory. As no presumption of reasonableness exists in the case of a tariff constructed by the carrier, an investigation of the single rates in

the tariff would have to be made to determine their reasonableness. No such investigation has been made in the case at bar, and the question whether the gross revenues of appellant, after balancing against them the gross operating expenses, will leave a net balance sufficient to pay a fair return upon the value of the entire property is not an issue which the court can, in the first instance, investigate and determine.

With a view of elucidating this point and supplying authority for the position here taken, we submit the following excerpts from important cases.

Pursuant to the powers granted by the legislature of Texas, the State commission made a classification and a "body of rates" applicable thereto. These rates, as a whole, were challenged as unreasonable, unjust, and confiscatory. This court, speaking through Mr. Justice Brewer, said:

> The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether *a body of rates prescribed by a legislature or a commission* is unjust and unreasonable, and such as to work a practical destruction to rights of

> property, and if found so to be, to restrain its operation.
>
> * * * * *
>
> A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. * * * By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in the case *is of the tariff as a whole, and not of any particular rate upon any single class of goods.* As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule *or rearrange this.* Our inquiry is limited to the effect of the tariff *as a whole*, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of the quasi legislation. (*Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397.)

An act of the Legislature of Nebraska "to regulate railroads, classify freights, and fix reasonable maximum rates," was considered, and this Court, speaking through Mr. Justice Harlan, said:

> It can not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property

on a railroad are exacted without reference to the fair value of the property used for the public *or the fair value of the service rendered,* but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

* * * * *

What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway *than the services rendered by it are reasonably worth.* * * * (*Smyth* v. *Ames,* 169 U. S. 466, 541, 544, 547.)

In the Arkansas case, Mr. Justice Shiras, speaking for the court, said:

This court has declared, in several cases, that there is a remedy in the courts for relief against legislation *establishing a tariff of rates* which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. * * *

The act of the Legislature of Arkansas fixed a maximum rate of 3 cents per mile for passenger fares throughout the State. It was claimed in this case that one branch of the road could not carry passengers for this fare without loss. The court further said:

> * * * the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company can not claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; *that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated;* and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the State of Arkansas. * * * (*St. L. & San Francisco Railway* v. *Gill*, 156 U. S., 649, 657, 665.)

In the Minnesota case, Mr. Justice Brown, speaking for the court, said:

> *It was not even shown that the joint tariff fixed by the roads themselves upon coal was not disproportionately high as compared with*

rates upon other articles or as gauged by a proper classification. The difficulty with defendant's case is that it made no attempt to show the cost of carrying coal in carload lots, and that even in proving that the cost of transporting *all* merchandise exceeded the rate fixed by the commission on this coal, the interest upon bonds and dividends upon stock were included in operating expenses. The propriety of the first is at least doubtful; the impropriety of the second is plain. We do not intend, however, to intimate that the road is not entitled to something more than operating expenses. * * * True, it may be difficult to segregate hard coal in carload lots from all other species of freight and determine the exact cost to the company; but upon the other hand, the commission, in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low. * * *

In exercising its power of supervising such rates the commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article or class of freight is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of

> transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be within the power of the commission to compel such a tariff, it would not upon the other hand be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders. (*Minneapolis and St. Louis R'd Co.* v. *Minnesota*, 186 U. S., 257, 266, 268.)

In Covington, etc., Turnpike Co. v. *Sandford* (164 U. S. 578, 597) the court, speaking through Mr. Justice Harlan, said:

> * * * The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation can not maintain such a highway, and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. * * *

Noting then the inquiries that must be made in order to determine the application of a system of rates, the court further said:

> In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, *as an entirety*, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. * * *

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* (222 U. S. 541, 548) Mr. Justice Lamar, speaking for the court, said:

> * * * In the first place there was no appeal from the master's finding that—
>
> "The carriers concede that they are unable to determine the cost of this traffic, in and of itself; and that they are unable to say, with any satisfactory accuracy, whether or not they make a profit upon it; but they have all conceded that, in their judgment, speaking as experts, the lumber traffic has not been confiscatory and has not been performed *for less than cost*."

> This concession, of course, does not cover the question at issue, but it does fix a starting point. It establishes an important fact in dealing with the difficult question of determining *what is a reasonable rate on a particular article.* Where the rates as a whole are under consideration there is a possibility of deciding, with more or less certainty, whether *the total* earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article. * * * Too many elements are involved in fixing a rate on a particular article over a particular road to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.
>
> In this case the commission had before it many witnesses and volumes of reports, statistics, and estimates, including the rates on lumber charged by other roads and those charged by these carriers on other classes of freight. * * *

Fair deductions from the foregoing cases lead to the following conclusions:

1. To pass upon an entire system or tariff of rates, constructed by a carrier, it must appear from evi-

dence, and be determined, that the rates on all classes of traffic are relatively reasonable to the public, there being no presumption of reasonableness in their favor.

2. That the particular traffic in controversy is not unduly burdened by being charged unreasonably high rates in order to take care of and reimburse the company for carrying another class or classes of traffic at unreasonably low rates, or to protect the company against an unprofitable investment.

3. That the ascertainment of the value of the entire transportation property of a carrier is only required, and should only be made, when a system or tariff of rates, *as a whole*, is under consideration.

To allow a railroad company to avoid an investigation into the reasonableness of its entire tariff of rates while claiming that the reduction of a single rate, or rates upon a particular traffic so reduces its gross revenues that it will not earn a fair return upon the present value of its property, would work grave injustice; it would leave the public wholly unprotected against the effect of unreasonably low rates upon favored traffic and compel it to pay unreasonably high rates upon other traffic to make up the loss.

We do not fail to recognize the fact that a railroad company can voluntarily carry freight at less than reasonable rates and possibly less than the cost of service, if it chooses to do so, but it can not do this and at the same time insist that other classes of

freight shall be charged unreasonably high rates in order to make up the loss on the favored traffic; the company must bear such losses. This principle is sustained by the authorities cited.

If these premises are correct, we are brought to a consideration of the question: Can the court determine that the rates charged by the petitioner upon all classes of traffic are reasonable? This question, we submit, has been answered in the negative by this court in *Texas & Pacific Railway Co.* v. *Abiline Cotton Oil Co.* (204 U. S. 426, 444). The general principle is stated by the Chief Justice in that case as follows:

> After deciding that the orders of the commission were not entitled to be enforced because of errors of law committed by that body, this court declined to consider the question of the reasonableness *per se* of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was therefore declared to be the duty of the courts, where the commission had not considered such a disputed question, to remand the case to the commission to enable it to perform that duty, a conclusion wholly incompatible with

> the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the commission, primarily to determine the reasonableness of rates in force through an established schedule.

The principle was asserted in the *Illinois Central* case and the *Union Pacific* case, and in *Procter & Gamble* v. *United States* (225 U. S. 282, 297). In the latter case the court, speaking through the Chief Justice, said:

> Originally the duty of the courts to determine whether an order of the commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the commission, for the purpose of enforcing or restraining their enforcement, the courts were confined *by statutory operation* to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. (*Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452.)

In the case at bar the appellant was permitted, over the objections of the appellees, to enter upon a valuation of its property, show its gross and net

receipts and the supposed effect thereon of the order reducing the rates on citrus fruits and vegetables. This appellee offered no evidence as to the valuation of the property (1) because it was irrelevant to the issue in controversy and (2) because no appropriation for the valuation of the property has been made by Congress.

Until Congress or the Interstate Commerce Commission shall establish a system or tariff of rates for the appellant, there will be no "body of rates" that can be considered as an entirety, and as to which a presumption will exist that all the rates in the tariff are reasonable. Until such a tariff exists with which the court can deal, we respectfully submit there is no jurisdiction to institute an original inquiry as to the value of the entire property of the appellant; that such valuation, under the conditions existing in this case, is irrelevant and improper, and that this respondent should not be called upon to defend such an issue; that confiscation can not be predicated of a reduction of the total revenues of the carrier caused by an order reducing a single rate or rates upon a particular traffic.

If this conclusion be sound, it disposes of all the assignments of error in this case which have reference to the valuation of the appellant's property, for the purpose of determining whether its net revenues pay a fair return upon the present value of its property.

II.

Did the commission, in the proceeding in which the order was entered, conform to statutory authority?

Counsel for appellant, in the brief filed herein, seek to convey the impression that they were misled by remarks and communications by Commissioner Prouty. The copy of the brief furnished to this appellee does not give the pages of the record relied upon to support these charges. In every case where the record page is given, and in all cases so far as we are able to discover from a careful review of the record, these remarks and letters referred to by counsel—with the exception of the proposal to value the property heretofore quoted—were made or written prior to January, 1911, and they had reference to the procedure and investigation being made in one of the first two cases; they do not apply to or in any manner affect the procedure in this case in which the order complained of was entered. They have no bearing upon, or relevancy to, the issue under consideration.

As before noted, the appellant appeared by its counsel on March 2, 1911, and took a very active part in the case; statements were made by counsel regarding the company, its financial affairs, its traffic, etc.; counsel was invited by the commissioner to produce any and all evidence it desired to produce before the commission upon the issue involved—the issue being clearly and fully stated; printed briefs and oral arguments were made on behalf of appellant.

No evidence was submitted by the appellant or arguments made tending to show that the rates discussed and proposed were unreasonable *per se*. There was no denial that the rates would produce a large profit over and above the cost of the service. The whole controversy on behalf of the appellant was, that to reduce the rates on fruits and vegetables would so affect its gross revenues as to prevent the railroad from earning a return upon the total value of its *entire line*. In other words, counsel insisted that the rates should not be determined with reference to reasonableness *per se*, but upon a revenue basis. If the revenues of the company were to be reduced, it was then, as now, contended that the net revenues would not constitute a fair return upon the value of its entire property. This was and is the only issue in this case—are single rates or rates upon a particular traffic to be determined upon a revenue basis?

It is not contended by appellee that the general financial condition of a railroad company, as shown by its sworn reports to the commission, should not be considered in determining rates. This is one of the facts which is considered by the commission, and was considered and fully discussed in this case. (Record, pp. 29, 30.) The ability of appellant to carry this traffic upon the same terms with the other defendant carriers was also discussed and determined; (Record, pp. 30 and 31), but the giving of due and proper consideration to these general conditions shown by the reports and to special conditions which may

be shown is a very different proposition from the one insisted upon by appellant that, to determine a single rate or rates upon a particular traffic, the revenue basis must be adopted and an extended and expensive program of valuation be entered upon to determine the present value of its railroad property.

In determining the reasonableness of a single rate, or rates upon a particular traffic, all pertinent facts should be considered, but in the final analysis a claim of confiscation must, in such cases, be determined by an inquiry as to whether the rate established is below the cost of service with some profit. In this case there is a large profit above the cost of service.

It may be admitted, by way of argument, that the statute does not authorize the commission to establish an unreasonably low rate, if by that is meant a confiscatory rate, but to be confiscatory it must be an unlawful rate. An unlawful rate has been defined by this court.

In *Southern Railway Co.* v. *St. Louis Hay & Grain Co.* (214 U. S., 297, 301) this court, speaking through Mr. Justice Brewer, regarding a single service, said:

> * * * The commission found that $2 or $2.50 per car, or approximately 1 cent per hundred pounds, was the actual cost to the railway company.
>
> We are unable to concur with the commission. If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that

> privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish * * * it *is entitled to receive some compensation beyond the mere cost for that which it does.*

In the *Burnham, Hanna, Munger* case, speaking through Mr. Justice McKenna, the court said:

> Two grounds for injunction are alleged. One is that the new rates are confiscatory. There is no proof whatever that the rates which the commission prescribed as just and reasonable are not sufficient to pay the cost of handling that traffic, to cover that traffic's full proportion of maintenance and overhead expenses, and to return to the carrier an ample net profit. * * * For the purpose of this hearing, therefore, it must stand as an agreed fact that the present reduction is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation. (*Interstate Commerce Commission* v. *Burnham, Hanna, Munger Dry Goods Co.*, 218 U. S., 88, 111.)

In the *North Carolina Rate* case the court, speaking through Mr. Justice White, now the Chief Justice, said:

> In a case involving the validity of an order enforcing a scheme of maximum rates, of course the finding that the enforcement of

such scheme will not produce an adequate return for the operation of the railroad in and of itself demonstrates the unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in *St. Louis, &c., Ry. Co.* v. *Gill* (156 U. S., 649) and *Minneapolis & St. L. R. R. Co.* v. *Minnesota* (186 U. S., 257). * * * The power to fix rates, it is urged, in the nature of things is restricted to providing for a reasonable and just rate, and not to compelling the performance of a service for such a rate as would mean the sustaining of an actual loss in doing a particular service. To hold to the contrary, it is argued, would be to admit that a regulation might extend to directing the rendering of a service gratuitously or the performance of first one service and then another and still another at a loss, which could be continued in favor of selected interests until the point was reached where by compliance with the last of such multiplied orders the sum total of the revenues of a railroad would be reduced below the point of producing a reasonable and adequate return. But these extreme suggestions have no relation to the case in hand. * * * (*Atlantic C. L. R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S., 1, 24, 25.)

If this elucidation of the law is right, then it follows that a petition claiming that a single rate, or a rate upon a particular traffic, fixed by the commission, is confiscatory must allege that the rates fixed are below a sum which represents the cost of service and some profit; otherwise the petition fails to present a cause of action.

The rates established by the order in this case are lawful rates—that is to say, they are far in excess of the cost of the service. The commission therefore acted within its statutory authority and established lawful rates.

III.

Did the commission, in making the order in question, exercise its power so arbitrarily as virtually to transcend the authority conferred by the statute?

The appellant fails to point out any ground, not already discussed, for its claim that the commission acted arbitrarily in this case. Due notice was given of all the proceedings; full opportunity was given for the presentation of evidence, briefs, and arguments. But counsel for appellant in their brief (p. 23) say:

> In the decision itself the commission stated that after the hearing (and without notice to the appellant) it received ex parte statements from parties which unquestionably affected its decision.

No reference is given to the record as authority for this statement and we do not find anything that

warrants it. In the opinion, beginning at the bottom of page 26 (Record), answering an assertion by appellant's counsel, that the existing "relation of rates was satisfactory," it is stated:

> It is also true that upon this hearing no particular locality was complaining of its rates as compared with other localities; but since the conclusion of the hearing the commission has received, in several instances, petitions from different points of production, insisting that the rates from those points were too high as compared with other points, and the proposed schedules of the Florida commission suggest a much greater reduction from present rates at more distant than at near-by points.

The railroad commission of Florida was representing the whole State, the shippers from every locality, and was endeavoring to further their interests. It was true that no particular locality in the State was independently represented. The State commission and the association represented every locality and sought to secure a distance scale of rates that would insure equality to all localities.

The fact that petitions were filed after the hearing is referred to in the report to meet the assertion of the appellant that there was no complaint about the existing relation of rates which warranted the railroad commission of the State in pressing for a reduction in the rates and a uniform scale of rates throughout the State. There was no evidence taken under these pe-

titions, and nothing stated in them is referred to or relied upon in reaching the conclusions in the case.

The report of the commission (Record, p. 22) states:

> Numerous complaints were made to the railroad commission of Florida that these fruit and vegetable rates up to the base points were excessive, and that commission, for the purpose of informing itself, held investigations in all parts of the State where these defendants operate.
>
> It found a general feeling among growers that the rates were extravagant, for the reason apparently that the industry under the present rates was not sufficiently profitable. From its investigation it reached the conclusion, as stated by its chairman, that the rates were too high.

The complaints of shippers and particular localities were thus brought to the attention of the commission.

The evidence taken in March, 1911, in addition to the evidence taken in the former hearings, stated in the reports of these hearings, supports the order in controversy. If there was any conflict, it was for the commission to determine the issue of fact.

The order was not wholly satisfactory to either side, but the commission was of opinion that the decision reached was just and equitable to all concerned. As the administrative tribunal, charged with the duty of enforcing the act to regulate commerce, the commission fixed what it believed to be reasonable rates for the future upon the roads of all of the defendants;

and we respectfully submit that there being substantial evidence to support the order, the appellant has failed to sustain its contention that the commission exercised its authority arbitrarily.

IV.

Questions of fact.

There are many questions of fact discussed in appellant's brief which were presented to the Commerce Court which we do not discuss in this brief for the reason that we understand, from the opinions cited, this court will not consider questions of fact. For instance, considerable space is given by appellant's counsel to the question whether the main line of the appellant stops at Miami or Homestead. Upon the financial books of the company the line is divided into two parts:

(1) The "main line" originally operated from Jacksonville to Miami, a distance of 366 miles; there were several branches or feeders, among which was the one to Homestead, known as the "Cutler extension," running a distance of 28 miles into one of the most fertile spots in Florida. The total mileage of the main line and branches is over 400 miles; the total cost, as reported to the commission, was about $15,000,000. This was the amount stated at the hearing as its cost by Mr. St. Clair-Abrams. (Record, p. 1565.) A special examination of these accounts was made by the commission after this suit was brought and several improper items were found charged to the property account as cost of the road.

Mr. Flagler, the sole owner of the road, had taken an issue of bonds of the par value of $6,000,000 at 50 cents on the dollar, and there was in the property account $3,000,000 "for loss on sale of bonds," two other entries, "Interest on capital stock," amounting to nearly $1,000,000. (Record, p. 878.) These items did not represent any cash expended and aggregated about $4,000,000. Since the hearing before the commission a considerable amount has been spent by way of betterments to the main line. The actual cost of this 400 miles of the road, therefore, does not exceed $14,000,000. (Record, p. 879.)

(2) "The Key West extension." This extends from Homestead to Key West, a distance of 128 miles. It is treated in a separate account by appellants; the rates over it are higher by permission of the Florida statute and it has cost about $175,000 a mile, or over $22,000,000.

The main line serves the fruit and vegetable growers upon the east coast of Florida; the over-sea extension does not create any new connections of account, and will not until the Panama Canal is completed. The boat lines originally established by appellants from Miami to Key West and Cuba served those points before the extension was built. Key West is now served by rail and Cuba by a shorter water line from Key West.

The fourth assignment of error raises an immaterial question of fact, namely, whether the appellant decided to build its Key West extension prior to 1905. In 1893 the board of directors passed a formal resolu-

tion locating its line generally from Miami to Key West. No action was ever taken under this resolution. After this resolution was passed, the railroad established its terminals at Miami with boat lines to Key West and Cuba. About $2,000,000 was expended upon docks and the harbor at Miami for this service. Its railroad depot was placed on the water front convenient to the boats. An extensive contract was entered into with the United States for the improvement of the harbor. The magnitude of this improvement showed clearly that the southern terminus of the road was to be at Miami, with a branch to Homestead.

In 1902 the Congress of the United States provided for the construction of the Panama Canal, and later (1904) made appropriation for the construction of the canal. On May 3, 1905, the Legislature of the State of Florida passed an act "to encourage and secure the construction of a line of railway from the mainland of Florida to Key West." The act referred to the construction of the Panama Canal, and the importance of securing "the State a fair proportion of the traffic passing through the said canal." On June 6, four days after the passage of this act, a special meeting of the stockholders of the appellant was called and the meeting was held on July 10 "for the purpose of considering the construction of a line of railroad from the mainland of Florida to Key West, under and pursuant to the act of the Legislature of Florida." (Record, pp. 896 to 902.) Referring to the Florida act, the resolution

adopted recited that in "the judgment of the stockholders of the Florida East Coast Railway Co. it is to the interest of said company to extend the railroad of said company from the mainland of Florida to Key West and to construct the same under and pursuant to the act of the Legislature of Florida hereinbefore recited." The result of all this has been the practical abandonment of its docks at Miami for the purposes intended; its depot is to be moved back in Miami upon what was the branch line running to Homestead but is now the main line to Key West. This action shows conclusively that there was no intention of building to Key West until after the Panama Canal was started. Mr. Parrott, the president of the road, referring to prospective business for the extension, said: "But our main dependence is out of the Panama Canal, which we had first supposed we were dealing with, but as the proposition has grown it looks as though it was very largely out of the island of Cuba." (Record, p. 731.)

No money could be obtained in the financial world to build this road, but no one doubts that Mr. Flagler had a perfect right to expend $22,000,000 building this remarkable railroad if he saw fit to do it; but, we submit, he has no right to charge unreasonable rates to the fruit and vegetable growers of Florida in order to earn a return upon such an investment.

The net income of the appellant for the fiscal year ending June 30, 1911, was $1,272,908.10. With the exception of $100,000, in round figures, this was all earned upon the main line and its branches.

The revenue from the main-line traffic will pay over 8 per cent upon the cost of that part of the road and nearly 4 per cent upon the cost of the entire line to Key West.

V.

Findings of the commission.

The order in this case is found on pages 33, 34, and 35 of the record. It applies the distance scale of rates established and in effect for pineapples upon the Florida East Coast Railway to the transportation of citrus fruits and pineapples from all points upon the three lines of railroad in Florida to Jacksonville. In reference to vegetables, the commission found that—

> Taking everything into consideration we are of the opinion that the vegetable rate in carloads should be per crate approximately 70 per cent of the orange carload rate per box when under ventilation and 80 per cent under refrigeration. The less-than-carload rate may exceed the ventilated carload rate by 2 cents per standard crate up to distances of 300 miles, beyond that by 3 cents. (Record, p. 29.)

Upon these general findings the order establishes certain carload and less-than-carload distance rates upon pineapples, citrus fruits, and vegetables under refrigeration and under ventilation (Record, p. 35). These maximum rates were fixed by the commission and enforced against all three of the defendants in this investigation.

The commission in its report says (Record, p. 30):

> Taking that [financial condition of the Florida East Coast Railway] into account, to-

> gether with all the other facts and circumstances bearing upon the matter, we are of the opinion that the rates suggested for the Seaboard Air Line and the Atlantic Coast Line in the State of Florida would be just and reasonable to apply upon the railroad of the Florida East Coast Railway Co. Those rates are already in effect upon pineapples and do not involve any extraordinary reductions from the rates on vegetables and citrus fruits, which that company has voluntarily established.

The commission further says (p. 31):

> We are then of the opinion that those rates upon pineapples, citrus fruits, and vegetables, which would result from the application of the distance tariff given below upon the lines of the Florida East Coast Railway Co., the Atlantic Coast Line Railroad Co., and the Seaboard Air Line Railway from points in Florida up to Jacksonville, when for beyond, would be just and reasonable, that they ought not to be exceeded for the future, and that the present rates of those carriers are unjust and unreasonable to the extent that they exceed such rates.

It will be observed that the commission finds these maximum rates to be reasonable upon each railroad concerned and also finds the rates prevailing upon these railroads, respectively, unreasonable to the extent that they exceed the maximum rates fixed by the commission. The result of this order was to establish reasonable and uniform gathering distance

rates upon pineapples, citrus fruits, and vegetables from every producing district in the State of Florida to Jacksonville, the base point, when applied to interstate traffic. All undue discrimination between producing localities as to these gathering rates was thereby precluded.

As to the conditions of the traffic and its former findings the commission said:

> There is nothing in this record which would call for a reconsideration of our former conclusion if exactly the same question were now before us.
>
> There is, however, a material difference in one respect between now and then. When we decided the original case, rates up to the gathering point were in all cases any quantity, and in most instances this was also true from the base point to destination. In our first order in No. 1168 we established carload rates upon citrus fruits and pineapples from base points to destination which were lower than less-than-carload rates and we suggested that carload rates be also established from base points on vegetables. This suggestion was not accepted by the carriers, and as a result supplemental proceedings were brought asking the commission to order the establishment of carload rates upon vegetables, which was done. (*Florida Fruit & Vegetable Shippers' Protective Asso.* v. *A. C. L. R. R. Co.*, 17 I. C. C. Rep., 552.)
>
> There are therefore in effect to-day by the order of this commission carload rates upon both fruits and vegetables from base points.

> No carload rates, or at least none which need be mentioned, are in effect up to the base point upon the Atlantic Coast Line and the Seaboard Air Line. None were in effect upon the Florida East Coast until our order established such rates upon pineapples. Since then that company has filed carload and less-than-carload rates upon citrus fruits and vegetables, but these rates are higher than those named by us for pineapples. (Record, p. 24.)

The commission had held several hearings upon different branches of the complaint. In this investigation it sought to take into view the producers and the traffic upon all the lines represented and to arrive at *reasonable* uniform distance rates to the base point. This was fair to the railroads and fair to the shippers; it would prevent any discrimination.

The commission had power to take this broad view.

> The outlook of the commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided.
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> *Interstate Com. Com.* v. *Chi. R. I. & P. Ry.* (218 U. S., 88, 102–103).
>
> *Interstate Com. Com.* v. *Chi. B. & Q. R. R. Co.* (218 U. S., 113).
>
> In determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the commission

acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling.

Interstate Com. Com. v. *Union Pac. R. R.* (222 U. S., 541, 547).

The findings of the commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. (*Ill. Cent. R. R. Co.* v. *I. C. C.*, 206 U. S., 441.)

Cincinnati, etc., Ry. v. *Interstate Commerce Commission* (206 U. S., 142, 154).

Interstate Commerce Commission v. *Union Pacific Railway Company* (222 U. S., 415, 446).

The commission proceeded and acted strictly within the powers conferred by the statute.

Government regulation of rates would become a farce if, under the conditions appearing in this record, this order should be set aside on the ground that it would deprive the appellant from earning a larger return upon its investment.

We respectfully submit that the order of the commission should be sustained and the decision of the Commerce Court affirmed.

Respectfully submitted.

CHARLES W. NEEDHAM,
Assistant Solicitor,
Interstate Commerce Commission.

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